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MELVIN D. BARGER

Why Teacher Power Had to Happen

A CLOUD that was once the size of a man's hand has now grown to become a stormy presence engulfing public education throughout the United States.

This new presence is "teacher power," the political strength of the public teachers' unions and their allied organizations. John Ryor, president of the National Education Association, calls "teacher power" a term that has grown from a "wistful cliche to an unchallengeable reality" and insists that its uses must include making teachers the "foremost political power in the nation" and seeing to it that teachers "are no longer blocked out of educational decision making."[1] Two years ago, one of Ryor's predecessors, Dr. Helen Wise, listed as an NEA goal the election of a "veto-proof Congress" as far as education bills are concerned.[2] Other teachers' organization leaders are saying similar things. Meanwhile, state legislators and Congressmen are beginning to feel the heat of teacher power as wielded by the NEA and its rival organization, the American Federation of Teachers.

The initial effects of teacher power are noticeable increases in

Mr. Barger is a corporate public relations executive and writer in Toledo, Ohio.

[1] John Ryor, "The Uses of Teacher Power," *Today's Education*, November-December, 1975, p. 5.

[2] Reported by Frank Kane in the Toledo *Blade*, December 16, 1973.

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strikes and other exhibitions of teachers' militancy and political strength.[3] Further down the road, however, it's likely that teachers' organizations will completely dominate public education, even to the extent of shaping all curricula and calling the shots on the acceptance or repudiation of any specific educational philosophy. As in any political controversy, this development is seen as "good" by teachers and their allies and called "bad" by many others.

However it's regarded, "teacher power" is not an isolated development. It was really something that "had to happen" as a result of our system of public education and government interventions in private union-management relationships. The surprising thing is not that teachers have finally begun to exercise political power; rather, it is that it took them so long. From now on, however, the message is indeed clear: teacher power is Mr. Ryor's unchallengeable reality, and coping with this newly-discovered power is bound to become an awesome problem in almost every community.

To some people, the exercise of teacher power will be viewed as proof that teachers are being greedy and non-professional and "don't have the interest of the children at heart." But teachers, now a well-organized pressure group, believe that they have fallen behind other groups and that "professionalism" has been a ploy to keep them from organizing. They are also careful to say that all of their actions, including strikes that close schools, are for the benefit of the children. A few teachers may feel qualms about this new militancy, but more of them are beginning to act and think like union members.

Why did this "have to happen?" Why couldn't teachers – and other public employees for that matter – be content with the traditional privileges and status of their special kind of employment? Why did they have to launch a bid for power that now looms as a revolutionary movement that may completely change the schools?

There are several reasons why teachers are acquiring so much new muscle. Most of these reasons are rooted in our compulsory system of public education. Public schools, largely with general approval and consent, use several forms of compulsion that tend to "stack the deck" in favor of the producer group (i.e., the teachers) at the expense of the consumers (the taxpaying public, parents,

[3] See Paul Friggens, "Teachers on the March," *Reader's Digest*, February, 1976, pp. 112-115. In the 1974 elections, 229 of 282 teacher-assisted candidates won in the House of Representatives; in the Senate, 21 of 28.

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etc.). Compulsory education, harnessed with the compulsory practices of the labor union movement, gives teachers far more bargaining power than the typical craft or industrial union has in dealing with private employers. We must assume that teachers' organizations will take full advantage of the weapons given to them by the public educational system. At this point, it's difficult to see how reasonable checks can be made on their future demands. Here are some of the elements of teacher power that will have to be reexamined in the years ahead:

1) **Compulsory taxpayers' support of public schools.** The public school has long been a cherished American institution that has been considered to be operated in the public interest. For one thing, it has been generally accepted that a democratic form of government requires citizens to be literate and fairly knowledgeable, and that large numbers of people would be denied education if there were no public schools. Therefore, public education has been the responsibility of the community, and has usually been supported by the property tax.

This system had its drawbacks, and was always a potential threat to individual liberties. However, it also had a number of checks and balances that kept it from becoming tyrannical and wrecking local budgets. For one thing, property owners voted in school millage elections, and were always likely to express their approval (or disapproval) of their schools in this way. At the same time, local school boards could control the schools to a certain extent, and local voters usually had direct access to board members. This wasn't always fair — indeed, it was often viewed as oppressive by school teachers — but it did serve to maintain a certain balance between community attitudes and the policies of schools.

Parents could still feel that the schools were acting as their surrogates in the classroom. This worked reasonably well, and most older persons will remember that their own parents and teachers possessed similar values and attitudes. Each reinforced the authority of the other, and if you were punished in school, there was a good chance that you might receive further punishment at home. Meanwhile, the school was also expected to perform in "delivering" education. Much is said to deplore the fact that many Americans once attended school only through the eighth grade, but the fact is that *such students then possessed reading and writing skills at that level.* It is now common knowledge that a high school

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diploma is no longer proof that one necessarily has a high school level education.

But there was always a hidden weakness in the local tax-supported public school system. This weakness was in its susceptibility to takeover. In order to wrest control away from the community, it was only necessary to change the support base from local to state and Federal. Taxpayers lose voice in school matters when state and Federal boards take charge. Voting on local school millages, on the other hand, still retains some of the aspects of the marketplace, even though it is admittedly a somewhat unsatisfactory governmental program. But effective citizen control is lost when the schools are controlled or directed from state and Federal offices. When that happens, the only way to make individual views known is to organize as a pressure group, and this is too difficult and time-consuming for most parents.

The system is then ready for teacher control, since teachers are already organized as a pressure group and know what they want. Their leaders are well aware of the additional leverage they have in working with state and Federal officials rather than local systems, so they have been the leading advocates of increased state and Federal support of schools. Not only does this give them additional funds to bargain for, it also increases their own control of the school systems and effectively neutralizes the power of parents and local boards.

2) **Compulsory attendance.** Another weapon of the teachers' unions is that students are forced to attend schools in most states until they reach certain ages. Again, this compulsion has always been viewed as "good" by most Americans. The fear is always expressed that without compulsory education many children will grow up illiterate. We are apparently supposed to believe that any number of future Albert Einsteins and Jonas Salks would be deprived of ordinary reading and writing skills if we did not have compulsory school attendance laws.

The fact is, of course, that few parents would neglect their children's education even if attending were not compulsory. Some of them still have to resort to private education, such as tutoring, in order to help their children over serious learning difficulties. Also, compulsory attendance may even hamper the educational process, since it brings in students who do not benefit from the teaching and often disrupt classrooms to such an extent that other students are shortchanged. Compul-

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sory attendance has been vastly oversold as an instrument to advance general educational levels, and some knowledgeable people are beginning to challenge it.

But it's not likely that teachers' unions will ever seriously oppose compulsory attendance. It is one of the things that contributes to "teacher power."

3) **Teacher education and certification.** You have to be against God and motherhood to oppose the idea of graduate education and intensive certification of teachers, because these programs are supposed to be proof of greater competence and professional skill. This drive for increased education for teachers created a huge network of expensive teacher-training courses across the country, and it has made the "teaching certificate" a condition of employment in many systems.

The rationale for all this training is that individuals become better teachers if they possess graduate degrees and teaching certificates. But one way to learn about the value of these academic credentials is to find out what teachers themselves think of education degrees and courses. In many universities, the graduate education degree is considered much easier to obtain than other types of degrees, and required courses for teachers are jokingly referred to (by teachers) as "monkey courses" or "Mickey Mouse courses." Upon examination, the system of graduate teacher training actually turns out to be an elaborate device for raising teachers' pay levels and for excluding others from the teaching field.

By raising educational and certification requirements for teachers, the unions have been given a form of licensing power. We can also predict that teachers' organizations will soon begin taking steps to limit the number of persons who can enroll in teacher education programs. Another device they are likely to use in controlling entry to the field is to reduce the opportunities for student teachers to obtain the classroom experience that is necessary for preliminary acceptance. In this case, teachers would be borrowing a tactic from the craft unions, which arbitrarily limit the number of apprentices who are permitted to work.

4) **Education as a "right."** We should not overlook the influence of the various rights movements in giving teachers more power over the educational system. In recent years, the idea has surfaced that every individual has a right to an education, with society (i.e., government) being obliged to furnish it. Like many of the

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new "rights," this one has great potential for harm and can impose backbreaking burdens on the nation. Such rights, like the so-called "right to welfare," really are privileges or "pseudo-rights" that contain a number of deadly booby traps. Nevertheless, the idea that the individual has a right to an education has gone largely unchallenged, and probably will get further acceptance before it falls into disrepute.

For teachers, the "right to an education" philosophy means endless opportunities to build up their empires and to increase the budget in every school. We will hear teachers making the claim that children are being robbed of their right to an education because of large classroom sizes, lack of teaching aids, aging school buildings, or lack of special teacher training. We may also see the day when every student, regardless of qualifications or motivations, will be entitled to public education through college. This has already become the philosophy in New York City, where the "free" City College has been forced to accept hundreds of near-illiterate students. This may appear to be a farcical and self-defeating action to outsiders, but one must never forget that such a practice has the effect of creating many teaching jobs.

5) **Compulsory unionism.** Finally, the teachers' organizations and other public workers' unions owe much of their muscle to unions in the private sector, which established the precedent for the new militancy and tactics of teachers. Craft and industrial unions acquired unusual power more than 40 years ago with the passage of the Wagner Act, which forced employers to bargain with them and enabled labor organizations to force employees to join unions or pay dues into them. In one stroke, this legislation wiped out a number of natural checks and balances in labor-management relationships and gave unions the power to demand wages and benefits at above-market levels.

The unions were successful in convincing the public that most of their gains were at the expense of employers and could somehow be squeezed out of profits; thus, strikes were always represented as being against certain companies and not against the public. The unions were also able to convince non-unionized workers that they, too, were indirectly benefiting from various labor settlements, despite the fact that union activity had the effect of raising prices and increasing the numbers of workers who were competing for non-unionized employment (hence forcing wages down in that

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unorganized part of the economy).

Apparently few people, including leading economists, realized that if every worker belonged to a militant union, the result could only be a high level of unemployment, because it would be impossible to give everybody the same pay and benefits of workers in highly skilled trades or in capital intensive industries such as steel and automobiles. Union leaders did nothing to explain such facts, since it has been in their interest to increase their membership in every possible way and to present their mission as a struggle to force management to share swollen profits with the workers.

Meanwhile, teachers and other public employees began to feel that unionized employees in the private sector were moving far ahead of them in pay and benefits. There has been a tradition that public employees should not be permitted to strike, but it is obvious that such laws are not likely to be enforced by vote-conscious public officials. The rapid build-up of Government activity in every field has created vast armies of public employees with common interests and considerable political power.

The same rationale that is used to justify strikes in the private sector can also be used to justify strikes of teachers and other public employees. Other union members, though perhaps personally disturbed when their own teachers and garbage collectors go on strike, cannot really oppose such strikes in principle without undermining their own position. The leaders of craft and industrial unions are in a similar bind; they need the political support of public employees' unions and must therefore defend the right of public employees to strike.

So it is unrealistic to believe that special laws can be passed or enforced to make teachers and other public employees moderate their demands. The unionization of these groups was really a logical extension both of union growth and of the expansion of government into so many fields. True, it will prove to be somewhat more difficult for public employees to present their case, since they are not bargaining with a private employer who can be accused of making "unconscionable profits." But with these unions acquiring considerable political power, they don't have to be overly concerned about such matters.

Where Will It End?

With so many forms of compulsion working in their favor, teachers will undoubtedly attain Mr. Ryor's goal of becoming the foremost political power in the nation.

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There are few countervailing forces that might prevent them from reaching this goal. Most of the efforts to launch private schools and other movements in competition with the governmental educational effort are spotty and are not likely to offer suitable alternatives to the existing system. Teacher power is indeed an unchallengeable reality, largely because power has been placed in the hands of teachers' organizations and there's nothing around that can challenge it. Some libertarians have long realized that the educational system was headed in this direction. Writing more than 12 years ago, Leonard Read noted that the teachers were in a good position to seize control of public education:

> The government educational effort is a political apparatus and behaves accordingly. The indifference of voters invites special interests to assume command. For instance, if teachers adequately organize, they can easily control the government school system and supplant the voters as the responsibility-authority fountainhead. The deputies, the superintendents, the Board of Education, and the voters become the teachers' aides, so to speak, helping primarily as taxpayers.[4]

[4] Leonard E. Read, writing on "Academic Freedom," in *Essays on Liberty*, Vol. X, (Irvington, N.Y., Foundation for Economic Education, Inc., 1963), p. 370.

This does not mean, however, that we are about to enter a long night of dictatorship at the hands of teaching professionals. Teacher power is bound to create its own excesses, and the same compulsions that give teachers so much leverage in controlling the educational system are dangerous weaknesses in their program. Some libertarians have always feared that teacher control of the governmental educational system will bring brainwashing and total thought control. The more probable result is that the abuses of teacher power will also tend to discredit government education. As the system comes to be more completely the fiefdom of teachers, the problem of winning public support and cooperation is bound to become acute.

We can also be certain that teachers will be unable to deliver the kind of results that are promised in all their shrill rhetoric about the quality education that is supposed to come about when teachers receive more pay and benefits. Public schools are bedeviled by many problems that are not likely to dissolve no matter how much power teachers possess. We can even predict that teacher pressure to increase expenditures for public schools will tend to demonstrate the limitations of government education. Teachers will either be forced to re-examine

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their programs or to falsify the results of teaching. In fact, a form of the latter practice is seen in the current policy of issuing diplomas to poorly-educated students.

Still another reaction to teacher power will be the growing disenchantment of liberal intellectuals who have heretofore favored public education. These intellectuals, despite a certain naivete about human nature, believe that educational standards should be high and many of them are becoming critical of public schools and excessive egalitarianism in education. This disenchantment is likely to result in more criticism of public education from unexpected and influential quarters.

Meanwhile, there is certain to be a small but lively market for private education of all kinds in the years ahead, unless compulsion is used to stamp it out. Private education is still alive and well everywhere in the United States. The parochial schools and exclusive private schools are only part of it. There are also thousands of students receiving instruction from tutors, private classes, business schools, trade schools, privately-supported colleges, foundations, correspondence schools, self-improvement courses, apprenticeships . . . well, you name it. And there's still a great deal of respect for the grand education that a person can obtain simply through his own reading and conversations with others. Teachers will probably seize enough power to dominate the governmental educational apparatus and the formal schooling program. They are not likely to control the education of people who want to think for themselves. Given the conditions of our times, teacher power had to happen—but its use and abuse is likely to be a sound education for all of us.

IDEAS ON LIBERTY

Education in America

EDUCATION in America has become a reflection of the insistence that education be a function of government, cost free to participating students, fully financed at taxpayer expense. What originated as *local* schooling, supported by taxation in the immediate community (and therefore somewhat responsive to local and parental wishes) has inexorably moved toward bureaucratic bigness — the fate of all publicly funded projects.

GEORGE CHARLES ROCHE III

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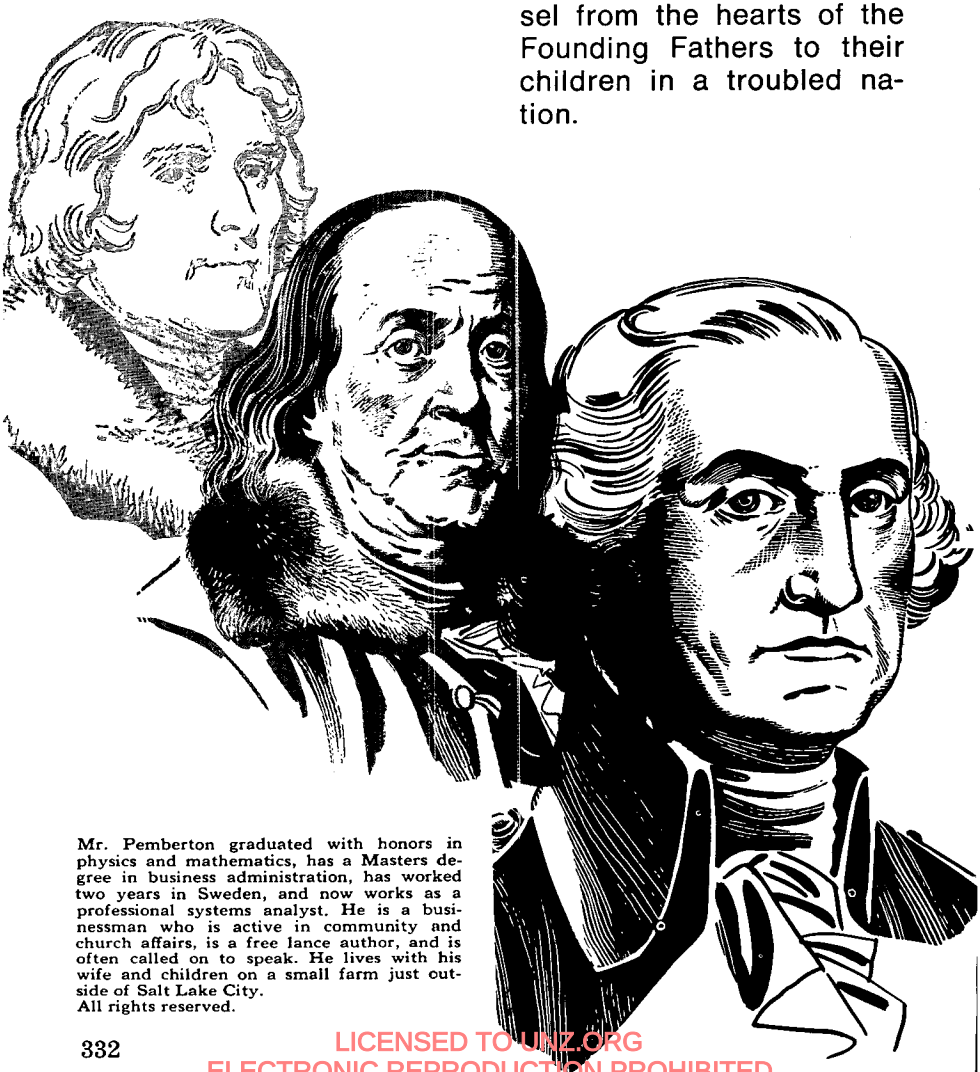
A NEW MESSAGE

JACKSON PEMBERTON

Words of courage and counsel from the hearts of the Founding Fathers to their children in a troubled nation.



Mr. Pemberton graduated with honors in physics and mathematics, has a Masters degree in business administration, has worked two years in Sweden, and now works as a professional systems analyst. He is a businessman who is active in community and church affairs, is a free lance author, and is often called on to speak. He lives with his wife and children on a small farm just outside of Salt Lake City.
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II. On Human Rights and Government

This continues a series of articles in which the author draws upon the extensive collection of the thoughts of the Founding Fathers and lets them speak to us relative to the problems we face in the United States today.

WE HAD TWO ALTERNATIVES: to yield to arbitrary regulations, unreasonable taxation, and meddling in matters that rightly appertain to one's private life; or, to resist. At the outset, our resistance amounted to petitions, emissaries, and other appropriate measures; but those efforts only solicited greater oppression instead of the relief we sought. Finally, in alarm for the safety of our most fundamental rights, and resolved by King George's declaration that we must submit or conquer, we went to war.

Your condition is similar to ours; in some regards better, in others worse. You can employ your Constitutional prerogatives to rectify the abuses of your government; but, on the other hand, you do not recognize the full import of the encroachments being made upon your rights. Human rights was a subject we were wont to discuss, and it contributed the principal motive in our fight for liberty.

The desire of my heart, in your regard, is to give you a full comprehension and a forceful conviction of both the type and source of your natural rights, for that would animate, empower, and guide you in your response to the growing intrusions of your government. In consequence of that wish I invite you to the following discussion. Please bear with me, for I mean to be brief but refuse to be superficial.

First, consider a stone. Does it have the right to occupy a part of the earth? What then of a poplar tree: has it the right to push aside the stone, to mine the ground for its sustenance, and to inhabit its portion of the world? Then reflect

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upon the beaver. Has it not the right to harvest the poplar and construct a home for itself and offspring? What is the source of the obvious rights of these things? They are inherent and intrinsic in their very beings. Their rights are not some attachment or appendage, but an integral part of their very existence, placed there by a wise Providence in the instant of their creation. So it is that man, in like fashion, is endowed by his Creator with certain unalienable rights: the divine rights of man.

Please observe how the rights of the poplar superseded those of the stone, and the beaver's rights were greater than the tree's; so man infringes upon the rights of them all for his own purposes, all of which is in harmony with the order of creation. Similarly, man is subject to the rights and powers of the Almighty, his Creator. Therefore, the entire essence of the matter of men and governments is revealed in the question: which is greater, the creator or the created? It seems so simple, does it not? Yet that is the crux of the struggle for freedom in all ages; and you should remember that anyone who would put government above man seeks to invert the order of creation and is in rebellion against his Creator.

Let us not cloak the matter of human rights in any mantle of mysticism: they do not arise from some philosophical argument, or inscrutable religious dogma; they are as real as the powers from which they spring! What precisely is a right? It is the authority or prerogative to use an inherent power or capacity. All creatures come into existence with certain powers and the necessary authority to employ them; or, to what use is a power if there be no right to exercise it?

Like the stone, the poplar, and the beaver, man is created with his characteristic abilities. He is conceived to think, feel, act, and influence people and things about him; and if he have those faculties, he must also have the right to use them. Any other condition denies him the exercise of those attributes which make him what he is, and transforms him into some lower order of creation. He is endowed by his Creator with powers to build and to destroy, and the right to use those powers according to his own free will.

But, if every man is to have free and equal use of his inherent abilities (which is what we meant by "created equal"), then the one man must be restrained from intruding upon the rights of the other; for, if one man be given the right to trample the rights of another, then the first has power over the very

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soul of the second, to prevent him the free development of his potential. It is precisely at this point that the requirement for good government arises; to insure that men will be restrained from abusing their powers by inflicting their own will upon their neighbors.

You will notice that government has no rights to give to man, but can only operate in the negative role of prevention and punishment, to discourage man from the wrongful employment of the powers and rights he already possesses. But more than that, notice that when those who direct the government (whether its officers or the citizens who elect them) take upon themselves the supposed authority to use the force of government upon other citizens to wrongfully infringe upon their rights, then government is made to operate in direct opposition to its only legitimate purpose for existence: then there is oppression. To whatever degree men use government to impose their will upon their fellows, to that degree are they tyrants.

You have allowed yourselves to be taught the concept that government is a creature in its own right; that it has its own inherent rights and powers. That is common nonsense! Government is nothing without officers to run it and citizens to respect it. Strictly speaking, there are no good or bad governments (some are more wisely organized than others), but only good and bad men. If your government has run afoul, it is not the fault of your government, for you will find it very difficult to discover ways to improve your Constitution in its ability to prevent government officials from misusing their authority. Nay, the error is not in the Constitution, it is in those who have abused the public trust in violation of the Constitution, and it is in those who have allowed them to continue in that abuse.

You will do well to ponder these thoughts carefully in your minds and hearts, for upon these concepts rises the plan of government which has given greater protection to the divine rights and powers of man than any other in all history. If you fail to understand these things, you will not understand your Constitution, and if you do not understand your Constitution, you will not be able to keep it.

Now go back with me a moment and notice that the foremost attribute of the rights of the stone, the poplar, and the beaver was their right to property; and what is more, if that right be denied them, they would be unable to fulfill the purpose of their existence. The stone would have no place, the

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tree no nourishment, and the beaver no hope. Likewise man, in consequence of his existence, has the right to earn, own, and control property of all types. To deny him that divine right is to destroy his opportunity to realize the fulfillment of his being and to place him lower in the order of creation than the stones beneath his feet! An impossible concept? Then beware of those who seek to direct you in the use of your property!

Now consider the rights of two men in relation to each other. Can one have more rights than another by virtue of his being? We might as well ask if the one has a greater right to attain fulfillment or to pursue happiness (as we were wont to say) than the other. No, not among men; they are created equal in all their rights. As soon as we allow the one more right than another, so soon do we declare that the one should be master and the other servant. Neither can any man appoint himself ruler over another without casting himself as the embodiment of oppression.

And finally, consider two men acting in concert. Do they, by reason of their number and association have any greater right than either of them alone? No. They may form alliances, plot, and plan, but strive as they may, they cannot conjure up any greater rights than they possessed before they were organized. The reason for this is not difficult to ascertain: societies, alliances, and governments are only abstractions, conveniences of thought and speech, and have no real, tangible existence in and of themselves. They are but words representing interrelationships established among men through the exercise of their individual powers.

If a society or government nad a palpable being of itself, it too would contain its own intrinsic source of rights; but all such are merely groups of purposes, rules, actions, and persons, only the last of which possesses tangible being and its attendant rights. Therefore, no organization, regardless of the exalted or base nature of its goals, can correctly exercise any rights greater than those of its creator, man.

Listen well my children, for it is ignorance of this principle which has allowed you to sleep while your government gained so much control of your lives, and by the same token, it is by the re-establishment of this precept that you will extract yourselves from its grip.

Were men governed by angels, there would be no need for governments administered by men; but the natural man is everywhere his

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own enemy and full of mischief, which necessitates an organization able to protect the inherent rights of its members from the abuse of their fellows. Thus men delegate a portion of their rights to governments in order to protect all their rights. Good government must derive its powers from the consent of the governed, for as surely as it steps beyond that authority, so surely does it partake of the whole spirit and intent of tyranny.

Therefore, government must be restricted to those activities which any one of its citizens might rightfully pursue; for if the individual have not the right, how shall the government obtain it save by creating some supposed right out of nothing? Thus the difficulty in framing a good government lies in this: that it first must be given the power to restrain its citizens from violating the rights of their fellows, and at the same time the citizens must be able to control their government lest it gain the upper hand. The purposes for which good men create governments are to protect their lives and rights from domestic and foreign dangers, and to assure them the peace and liberty in which they may reach for the heights of their noblest dreams.

We wittingly formed a limited federal government, a necessary instrument of national security, and the people consented to endow it with authority by ratification of the Constitution. It would be disappointing enough if your government were now only huge, clumsy, and misused by ambitious men; but it has manufactured rights out of thin air and now imposes itself upon you under the pretense of assumed powers. There is one of your greatest dangers. You must regain control of that usurpative monster ere it swallows all your rights, for when it has accomplished that it will have consumed the purpose of your lives also.

I perceive that you do not fully comprehend that your government has presumed to create rights unto itself, and thereby violated yours; consequently I shall make that the topic of a future discussion. For the purposes of this treatise, I wish to turn your attention to the magnificent and satisfying rewards which may obtain in a truly free society. Let me give you a glimpse of the vision that animated us during our discouragements and led us victorious through the perils of our revolution.

One of our troubles was the belief held by some of our countrymen in the divine right of kings; although, the only difficulty with that doctrine was that it was limited to the person of the monarch,

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whereas in truth, every man ought to recognize his divine right and obligation to correctly and justly administer the affairs of his own kingdom.

Every human being has a kingdom, a province which consists of all the persons and things for which he is responsible. Those within his province have likewise their individual realms of dominion; the child has his possessions and household chores; the parents have their children, the home, and their livelihood; the local alderman has his ward; and so on: and every man, as both king and subject, must respect the rights of his charges to their lives, liberty, property, and happiness. By administering with equity, charity, and humility, he may attract to himself other persons and things which would be pleased to place themselves under his influence. It is a heavenly order wherein each is allowed the free exercise of his rights and talents, and each is responsible and accountable for his own conduct. Clearly, there is the system where all can develop their character and talents to the fullest. There is the key to noble human progress.

It is especially necessary for you to understand the relationship between parent and child, as you have some difficulty in that matter. As man is the creation of, and in subjection to the Almighty, so ought children, partially the creation of their parents, be in like subjection to them until they are of age.

The Almighty does not force his will upon you, but gives you counsel and love, and holds you accountable for your actions; let parents regard their children in like fashion. Your children have been taught to rebel against your authority and to claim immunity to the laws to which they have not assented. Has the Creator asked our assent in respect to His laws? A child has neither the discipline nor the wisdom to live without the law or to assist in its formation; but a child, for the sake of order in society and its own protection, is obliged to obey the law, for that is in harmony with the order of creation and the plan of a free society.

In such a society, each man is free to pursue those occupations to which he is best suited and which will bring him the greatest satisfactions (within the law). The indolent poor are allowed to continue in the state they have chosen, and the misfortunate poor and the aged come by their condition with honor. The rich who are wise enough to share their plenty have no cause to rebel at the thought of transferring some of their excess to

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those who lack, and find in the attempt the personal rewards of compassion and charity. Thus can man lift himself and those about him. For one man to lift another, both must be free; all else is mastery and servitude, a polarity which ever tends to evil.

Now consider the full measure and meaning of true liberty, that sublime state we envisioned as we framed the Constitution, and the dream that lifted America to a higher plane than any nation has achieved before or since. Only in a society where each individual is allowed the free exercise of his rights and faculties and is held responsible for his actions, can he have complete opportunity to approach the realization of the full capacity of his being, and fulfull the purpose of his existence. And what is that purpose? Nature answers all around that as sand is made to stone, and poplar seed to poplar tree, and young beaver to adult engineer; so man, the child of God, should strive to use all rightful means to draw to himself wisdom and noble influence, so that he may, as much as possible, bless all in his province through love, counsel, and liberty. That was our vision. Now it is yours.

Next: III. On The Constitution

IDEAS ON LIBERTY

Magna Charta

OUR WRITER . . . tells us that formerly the right of taxation was in the King only. I should have been glad if he had pointed us to that time. We know that kings — even English kings — have lost their crowns and their heads for assuming such a right. 'Tis true this strange claim has occasioned much contention, and it always will as long as the people understand the great charter of nature upon which Magna Charta itself is founded, — No man can take another's property from him without his consent. This is the law of nature; and a violation of it is the same thing, whether it be done by one man who is called a king, or by five hundred of another denomination . . .

SAMUEL ADAMS, *Boston Gazette*, JAN. 9, 1769

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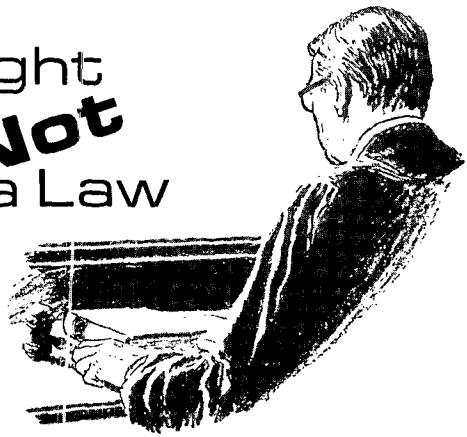
There Ought Not to be a Law



CLARENCE B. CARSON

PREMIER GEORGES CLEMENCEAU of France is supposed to have remarked, probably out of exasperation, about Woodrow Wilson's peace settlement proposals after World War I: "That man Wilson has fourteen points when God Almighty had only ten." Clemenceau's sentiments probably have been shared by generations of students who have had the onerous task of memorizing or trying to remember Wilson's Fourteen Points. It must be admitted, however, that by comparison with the multiplicity of laws, regulations, restrictions, prescriptions, court orders, and what not that Americans live under today Wilson's points were brevity and conciseness itself. Americans live under municipal ordinances or rules set forth by county commissioners, under a vast assortment of state laws and regulations, and under the assertive umbrella of Federal laws and administrative rule making bodies.

A few years ago, a student came to me after class to ask what he had to do in order to go into business. The student was a man, possibly in his thirties, for it was an evening class, and the question was not an academic one. He and another man were thinking of forming a partnership to manufacture components for something or other. Truthfully, I did not know the answer to his question,

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but I tried to be helpful by suggesting what came to my mind. They would need a license, I said, and then they could – well – just go into business.

My innocence and ignorance were exceeded only by my audacity in attempting to answer such a question. What they needed, of course, was a lawyer, or a battery of them, a Certified Public Accountant, a number of political friends in high and low places, an inordinate amount of audacity and tenacity, and a considerable bankroll. In that state, they would need to register the name of the company and, if it was made up, advertise it as a fictitious name in the newspapers. Their location would need to be checked for compliance with zoning ordinances and pollution controls. The fire department would need to inspect the building and its contents. A bookkeeping system would have to be set up that would satisfy the various tax collectors. If patents were involved, they would need to be researched, applications made, or whatever. But why go on, for who could really say all that ought to be done before going into business?

Social Reform

For a good many years now America has been more or less under the sway of the notion that society should be reconstructed, controlled, and directed by government. There are many sources of this notion, but there is no better way to get to it quickly than in the writings of two fledgling reformers of the early twentieth century, Walter Lippmann and Walter Weyl. Lippmann said, "We can no longer treat life as something that has trickled down to us. We have to deal with it deliberately, devise its social organization, alter its tools, formulate its method, educate and control it."[1] Weyl described how it was to be done: "To accomplish these ends the democracy will rely upon the trade-union, the association of consumers, and other industrial agencies. *It will, above all, rely upon the state.*"[2] That, of course, has been what was done, rely upon government, for that was his meaning.

This notion has now been implemented in hundreds, or thousands, of ways. Acts have been passed by legislatures, court orders issued, administrative rules promulgated, and vast bureaucracies created with the object of controlling the behavior of Americans. Massive efforts have been

[1] Walter Lippmann, *Drift and Mastery* (Englewood Cliffs: Prentice-Hall, 1961), p. 70.

[2] Walter E. Weyl, *The New Democracy* (New York: Macmillan, 1912), p. 297. Emphasis added.

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made to break up what were called monopolies, to take over and control the money supply, to regulate the operation of businesses, to train the young in the new "sociality," to renovate the cities, to supplement the income of farmers, to subsidize businesses, to license, prescribe the training for, and adopt behavioral policies for occupations and professions, to support labor union organization, to change our behavior by spot announcements on radio and television, to oversee some of the media of communication, to regulate transportation, to integrate the races, to provide "free" goods and services (of the kind they "should" want and use) to indigents, to the young, to the aged, and to whoever might be in need. The state – the government – has been relied upon to pass laws that are wondrous and awesome in their variety and detail with the purported object of achieving the good society.

One might suppose – one from another planet, that is – that all these boons from the state would have inspired in the citizenry such gratitude toward government that they would hasten to obey its will and hold in utmost contempt any who were truculent toward its powers. Not so, however, for lawlessness is rampant, and contempt for those who govern appears to be at a precarious level. The number of criminal prosecutions and civil suits is growing. The newspapers say that what they label as "white collar crime" is increasing more rapidly than any other. There is widespread opinion, informed and uninformed, that the number of people caught and prosecuted is only the exposed tip of the iceberg of lawlessness.

It is common to hear someone say, particularly when a politician is charged with some violation of the law, that what separates him from most of the rest is that he got caught. The number of policemen on the New York City force increased from a bit over 18,000 in 1950 to just under 31,000 in 1972, in Philadelphia from 4,889 to 8,183, in Chicago from 6,961 to 13,125, and in Los Angeles from 4,124 to 7,083. Some resistance to the law is open, as in rioting, obstruction of the police, and flouting of the law, but most of it is more or less covert. The more government attempts to do by law the less it achieves by way of compliance.

Support for the Law

There are many reasons why it is a mistake to rely upon government to direct and control social development, but there are two that are directly tied to law and law enforcement. One is that for

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a law to succeed in its object it must be widely accepted and generally complied with voluntarily. Violations need to be exceptional, and even then it is desirable when the criminal knows or accepts the fact that what he did was wrong. (It may be that law enforcement can succeed by continual terroristic tactics, but American reformers, at least, have usually eschewed such methods.) Reformers may have accepted this notion in theory, but in practice they have sought to give their reforms the color of law whether or not there was a consensus behind them.

They have used presidential decrees when Congress or the states would not act. They have made changes by simple act of majorities in Congress rather than getting constitutional amendments. Supreme Court decisions have been used to do what Congress would not. Administrative bodies with only a tincture of popular support have put into effect a vast assortment of rules and regulations, often in defiance of restrictions written into law by Congress. They have proclaimed that court decisions were "the law of the land," when court decisions were only the law of the case. In short, reformers have frequently, if not regularly, ignored the requirement that laws to be effective need general and, at some point in their background, consensual acceptance. It is not enough that some body be found which will proclaim them to be law; whatever is promulgated must be generally accepted as such.

Problem of Enforcement

The other fatal error arises out of the failure to understand or focus attention on what is involved in the enforcement of a law that does not have general acceptance, or, for that matter, the *enforcement* of any law (enforcement implying that there are violators). Law can be thought of in terms that make it noble and majestic. It can be visualized as a classic statue of Justice, blindfolded, on a pedestal, with balanced scales held in the hand. It can be thought of as what is going on when nine Supreme Court justices assemble within marbled splendor to contemplate some case. There are elegant phrases by which we attempt to express our respect for law: "A government of laws and not of men," "The rule of law," or even just plain "law and order." Probably, no one ever put the case for law in more exalted terms than did Thomas Paine when he declared that Americans should let the world know, "so far as we approve of monarchy, that in America *the law is king*. For as in absolute governments the king is law, so in

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free countries the law *ought* to be king; and there ought to be no other."[3] Nor should what follows be interpreted so as to detract from the importance of rule by law.

But there is a face of the law which rarely if ever excites admiration or beautifully phrased accolades; it is law enforcement or, to be more precise, what takes place as law is being enforced. There is good and sufficient reason for this. The enforcement of the law is a squalid, sordid, sometimes violent, often brutal, frustrating, discouraging, and brutalizing undertaking. Much of the work of doing it is by the toughest, least sensitive, and more violently disposed of those among us. It is enforced against a motley throng composed of petty thieves, cheaters, losers, violent and disenchanted people, and some who do not differ noticeably from the rest of us. We often think of law enforcement as being what the police alone do, but in fact it includes also the whole process from investigation through the last day of incarceration.

In earlier times, most phases of law enforcement took place in public, some portion of them, at least. Hangings were once public spectacles. When corporal or other forms of summary punishment were widely used, the public witnessed much of it. Until very recently, some states used convicts for grass cutting and other kinds of clean-up work along highways. Nowadays, however, the public rarely gets more than a glimpse at what goes on in enforcement, sees someone stopped on the highways, may view a trial (but few do, and only a few can), or see prisoners being transferred from one place to another.

Laws Proliferate when Enforcement Is Hidden

The practice of passing laws to achieve all sorts of purposes has increased in almost direct proportion with the decline of public contact with the grisly aspects of enforcement. It is easy enough to pass laws, or accept its being done, for all sorts of things if we can succeed in averting our gaze from what is entailed in enforcement. Those who say that reliance upon government is reliance upon force are right, of course, but it is not simply a reliance upon nice, clean, hygienic force, it is reliance also upon distempered, petty, mean, and brutalizing force.

A book has lately come to hand which makes these points authoritatively and in appropriate detail.

[3] Thomas Paine, *Common Sense and Other Political Writings*, Nelson F. Adkins, ed. (New York: Liberal Arts Press, 1953), p. 32.

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The book[4] was written by Judge Lois G. Forer of the Court of Common Pleas in Philadelphia. The Court of Common Pleas in Pennsylvania is at the same level as district courts, superior courts, and circuit courts in most other states. That is, it is the court of origination for the trial of most criminal cases and many civil suits. The judge in such a court is the fulcrum of those pressures which arise in law enforcement. The court is, to use another figure of speech, the main sieve to which most of those accused of some violation of the law must come. Those who go through the holes of the sieves, which is most of them, are either placed on probation or go to prison. Those who do not are set free.

No Time for Reform

Whether hers is a court of justice or injustice Judge Forer does not, indeed, as she describes it, cannot, know. She is too busy. There are too many cases. There is too much that there simply is not time to find out. She is inundated with cases, and back of those are many, many more that should have had an earlier hearing. On a typical day in court, she had three extradition cases, four applications for bail: one accused of rape, a fourteen year old accused of the murder of a child in a street rumble, a heroin addict who killed three strangers, and a middle-aged man accused of sodomy, a petition for a second psychiatric examination by a lawyer for his client, an application for an extension of an extradition warrant, and, as she summarizes, "The parade of accused muggers, robbers and thieves continues."[5] Each day, it seems, is its own slice of hell for this sensitive judge. She says:

> At the end of a day in which as a judge I have taken actions affecting for good or ill the lives of perhaps fifteen or twenty litigants and their families, I am drained. . . .
>
> Was Cottle really guilty? I will never know. Fred made bail. Will he attack someone tonight or tomorrow? One reads the morning paper with apprehension. It is safer for the judge to keep them all locked up [the accused, that is, not the newspapers]. There will be an outcry over the one prisoner released who commits a subsequent offense. Who will know or care about the scores of possibly innocent prisoners held in jail?

Here is a description from another source of how harried a courtroom may be. In this instance, it is a court located in Brooklyn and is a division of the New York City Criminal Court:

[4] *The Death of the Law* (New York: David McKay, 1975).

[5] *Ibid.*, p. 92.

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Pleas were taken. Decisions were made on whether the accused should be held for grand jury action. Bail was set. There were some brief trials. Probation reports were heard. Sentences were imposed. The courtroom was crowded, with constant flow and eddy of patrolmen, detectives, lawyers, courtroom attendants, district attorney's men, complainants, people freshly arrested, and people brought in from jail. . . . The entrance to the courtroom was a pair of swinging doors, and they banged back and forth like a corner saloon on Saturday night. Among the constitutional guaranties being violated was that of public trial. The public was there all right, but it could not witness the trial; the noise made what was going on at the bench inaudible to all but the participants. The woodwork was scarred. The plaster was peeling. It was a huge and grimy bargain basement of the law. . . .

. . . The judge worked on his feet, pacing back and forth and handing out justice right and left, probably with what was, under the circumstances, a good deal of accuracy. But the circumstances were wretched, and they made real justice impossible....[6]

But it is not only by harried judges in dingy courtrooms amid a cacophony of sounds that injustice takes place. Judge Forer maintains that the whole system of administration of justice is ringed about and shot through with injustice. It begins with the policeman, sheriff, patrolman, detective, or however the law enforcement officer may be styled. The policeman, Judge Forer points out, "acts as spy, militia, judge and jury,"[7] to which might be added, accuser, prosecutor, defender, and executioner. He can, and probably must, frequently look the other way when some crime is being committed, adjudging it to be too petty to bother with, too difficult to prove, or for whatever reason or unreason may lead him to ignore it. Or, he may, because of his mood or the pressures of a quota system or because his shoes hurt his feet or he had a quarrel with his wife, bring in everyone he suspects of wrongdoing, making for unevenness, hence injustice. He is equipped with gun, blackjack or nightstick, and handcuffs, and may use whatever force is deemed necessary to apprehend and subdue miscreants. Summary justice is sometimes dealt out by fist, by stick, by boot, or by gun. All of this he may do, of course, in the line of duty.

But let us stick as close as may be to the norm. Ordinarily, the law enforcement process gets underway with an arrest. No violence may ever occur in a particu-

[6] Charles Rembar, *The End of Obscenity* (New York: Random House, 1968), pp. 213-14.

[7] Forer, *op. cit.*, p. 180.

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lar case, but from that point until the accused is finally set free compulsion is at work. The arresting officer may have seen the offense, may suspect one has been committed, may be acting on information provided by someone else, or may be serving a warrant issued by a court. In any case, a halt, and, for those unaccustomed to it, a dramatic halt, is brought to normal life. The accused is separated from family and friends, taken away from job or position and whatever else sustains him in dignity and self-esteem, brought bound, as it may be, to be searched, interrogated, photographed, fingerprinted, and locked up in jail. He has become an alien, to at least some degree, from society, and is surrounded by the paraphernalia of shame.

Everyone knows, of course, that a man is innocent until proved guilty, that a presumption of innocence, as it were, shields him from punishment and disgrace. What everyone knows, however, is in this instance simply not true. The presumption of innocence is a venerable and noble concept of Anglo-American jurisprudence, admirable and correctly highly valued. But everyone, and especially anyone contemplating getting a law passed, needs to understand that it is a concept with only a most limited application. The punishment of a man who has been arrested has already begun, whether he is guilty or innocent. There is only one time and one place in the whole extensive process of law enforcement where a presumption of innocence is supposed to prevail according to our law, and that is during the trial in a courtroom after the accused has pleaded his innocence. At all other times and places there is a presumption of guilt, most likely, and it probably could not be otherwise.

Whatever Happened to the Presumption of Innocence?

It needs to be understood, too, that most of those who come into the toils of the law never receive the benefit of a presumption of innocence. The arresting officer almost certainly believes him to be guilty. It is much easier for him to assume guilt. If he *assumed* innocence (to get away from the terminology of the law, which speaks of presumption) it would mean that he was taking away the liberty of an innocent man, that he was doing something unjust and even probably illegal. Jailers and all those who have to do with holding people in custody need to believe them guilty for like reasons.

Little enough is known about what takes place in interrogation, but it is safe to assume that if an

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arrest has preceded interrogation the interrogator is likely to assume that the accused is guilty. Certainly, any interrogation proceeding under any but the most respectful and polite circumstances will have an underlying assumption. Quite often, the accused will be asked questions which place on him the burden of proving that he is innocent. Guilt is implied by any pressure which the interrogation applies.

The judge who sets bail cannot assume innocence at that point, for if he were innocent it would be improper to require any bail for him to be loosed. The most extensive injustice arising from this tacit assumption of guilt occurs, however, for those who cannot make bail. They are then held in jail, ordinarily, until a trial is held. Judge Forer speaks of six to eight months in jail prior to trial as if it were commonplace. Circuit Court Judge Richard Kelly testified in this fashion about some of the injustices of lengthy incarceration prior to trial before a committee of the United States House of Representatives. He did not assume that the jailed person might have been innocent, which may have been revealing or only indicated that his testimony was pointed in a particular direction because the committee was investigating prison conditions. He said:

> Most of the people that go to jail are poor. . . . They are young, frequently they have wives and children, and if you put them in jail and you keep them there for 4 or 5 months while you are processing their case, the refrigerator is repossessed, they lose their car, they may lose their wife. . . . And when you finally turn that man loose . . . it would be a hopeless situation for a strong person, and it is just completely hopeless for a weak person.[8]

Cf conditions in jail, he noted:

> So there is a lot that can be done in that area about expediting the cases, because a lot of tragedy takes place in these county jails. It does in my circuit. There are sexual assaults and other types of physical assaults. There is nothing in the way of recreation or relief for these people. . . .[9]

When a grand jury is brought into play prior to the trial, there may be a modicum of presumption of innocence, but it is only a modicum. The members of the grand jury hear only one side of the evidence, that presented by the prosecutor, and he may present only so much as he judges to be most beneficial in making his case. The grand jury is called on only to

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8 *Hearings Before the Select Committee on Crime House of Representatives*, I (Washington: U. S. Government Printing Office, 1972), 251.

9 *Ibid.*, p. 239.

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determine whether or not there is sufficient evidence against the accused to warrant a trial; it determines neither guilt nor innocence.

Most criminal cases are never tried. Judge Forer says:

> Few defendants are able to survive, financially and emotionally to utilize all the procedures which due process mandates. If any appreciable number of persons did exercise all these rights, refused to plead guilty and demanded a trial, the entire system of criminal justice would grind to a halt. Approximately 80 to 85 per cent of all accused persons plead guilty to some charge and avoid trial.[10]

But this by no means includes all who are accused of a crime who are never tried. Some are judged mentally incompetent or are otherwise unable to defend themselves and are not tried. Many, many others avoid trial by forfeiting fines, paying off their accuser and getting the charges dropped, or skipping bail. Indeed, the prosecutor may decide not to prosecute at some stage after arrest but before trial, and the charges will be dropped. For all these people, no presumption of innocence may have been brought to bear in any significant way.

But, it may be objected, if one has forfeited bail, paid off his accuser, skipped bail, or pleaded guilty, he must have been guilty indeed. It does not follow, though in the eyes of the law it may be the only possible conclusion. Trials are costly, and the outcome is always uncertain. Even those who plead guilty may be innocent of the crime they plead guilty to, or of any crime for that matter.

Guilty pleas frequently result from plea bargaining. The accused agrees to plead guilty to a lesser charge, and he may hope or have been told that he will receive a suspended sentence or fine rather than the extended prison sentence that awaits him if he is tried and found guilty. It takes no great amount of sophistication to understand that a guilty plea is a favor to the prosecutor, probably to the judge, and enables the court to get on with its business. To insist upon a trial is to court the wrath of these powerful officials. Would they not be expected to "throw the book at" anyone so obstinate? Would it not be better to please the prosecutor and plead guilty when a man has trouble enough already? In any case, all plea bargaining entails great likelihood of injustice. If the man is guilty as accused but let off on a lesser charge, he has not been punished as the law requires. If he was innocent, whatever penalty he received would be too much.

There are many areas that need

[10] Forer, *op. cit.*, p. 120.

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investigation by those who would rely on the state to reconstruct society, but there is one area that is absolutely essential. It is the arena in which law enforcement is completed. It is prison. Those who are convicted of a crime in America today are usually punished in one or more of three ways: by fine, by being placed on probation, or by imprisonment. Imprisonment is the ultimate resort to force that is normally sanctioned in the United States today. The reliance upon government is ultimately reliance upon prisons, for all who resist significantly the decrees of government may be imprisoned.

The Stigma of Prison

Prisons are notorious places, and those who have served time in them have a stigma attached to them. The tales of horror that may be heard from them during any investigation are such that it would be appropriate that the benediction which judges have ordinarily said for those sentenced to execution should be extended to those sent to prison as well. It might go something like this: "You are sentenced to x number of years in prison. May God have mercy on your soul." There is no need here to recount the horrors, for they involve everything from having to eat dog food (as punishment) to beatings to sexual assault to solitary confinement to denial of medical care.

Imprisonment begins with indignities, such as the search of the genital area for contraband, and ends by release with some or many rights curtailed. In between lies loss of liberty, subjection to the commands of others, economic deprivation, deprivation of normal sex, separation from society, and many experiences which are brutalizing in tendency. The use of force unredeemed by love and affection or noble purpose is brutalizing both on those who wield it and those on whom it is exercised. There is a consensus that both the guards and guarded are so affected in prison.

Imprisonment may not be unjust, but there are many injustices entailed in it today. The greatest injustice is one that is rarely, if ever, mentioned. It is the deep divisions that exist over the purpose of imprisonment, divisions that are found among voters, among legislators, among policemen, among judges, among lawyers, among wardens and guards and that afflict the prisoners themselves.

Is the purpose of imprisonment to punish? If so, does the imprisonment constitute punishment enough or should it be added to by incivilities and deprivations not

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inherent to prison? Is it the purpose of imprisonment to remove dangerous persons from among us? If so, minimum security prisons are probably a sad joke, and who has certified them safe when they are let loose? Is the purpose to rehabilitate the prisoners?

Now all these may be proper purposes of imprisonment, but if injustice is to be avoided they need to be arranged in a hierarchy to which we can generally subscribe. It is unjust to have one judge punishing and another rehabilitating, one parole officer removing dangerous persons and another punishing, all for the same or like offenses. It is a noble purpose to reform evil men, but the state is committed to justice, and when it embarks on reform it commits injustice after injustice.

How this occurs is told over and over by prisoners. Probably, the most common complaint of prisoners is the inequity in sentencing. Here is testimony on the point by a prisoner at Attica in New York:

> So, what happens? You come to Attica, and then you figure you will get a cellblock with somebody else who has the same crime as you, maybe, and he maybe gets 3 years and I get maybe 20. I get 10, somebody else gets 5. This disparity in sentencing. Certainly some remedy has to be found for the disparity in sentencing of the same identical crime.
>
> Down from my cellblock there's a young lad about 25 years old, married, with two children, smoking marihuana cigarettes. . . . That man got 7 years . . . for smoking or delivering some marihuana to an undercover policeman in Jamestown, and he got 7 years for that crime, and the next guy to him got 3 years for first-degree manslaughter. The original charge was murder, and he got 3 years.[11]

Whether the facts were as claimed in this case really does not matter here. They are recited only for impact. Everyone associated with law enforcement today will admit that the differences in sentencing exist and are common. They are the result, mainly, of differences over the purpose of prison. A man might reform himself or be reformed in prison if he thinks he is justly there, but he is unlikely to do so if he is consumed by resentment over the injustice of the sentence in the first place.

There are those who believe that one or another or all aspects of law enforcement can and should be reformed. The movement for prison reform in America is almost as old as the general system of imprisonment is alive and active today. There have been some recent efforts at modifying the bail-bond-jailing system for dealing with persons accused of commit-

[11] Hearings, *op. cit.*, II, 497.

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ting some crime. Large expenditures of money are being made to "upgrade" policemen. There is considerable talk and writing about speedier trials. Meanwhile, however, court dockets grow longer, many prisons are more crowded than earlier, and most people accused of crime go through the same unsavory processes as before.

A Harsh Process

This brief excursion into the nether world of law enforcement has not been made, of course, for the purpose of proposing reforms. It has been rather to show that it *is* a nether world, which it has always been so far as the present writer is aware of any history of it. So far as prison reform goes, reformers succeeded some while back in proscribing corporal punishment in prison. Yet, examples still occur of quite brutal physical treatment. The following is from an affidavit by a prisoner at Attica:

> Officer Burns then moved behind me and struck me on the left side of my head. I was then attacked by several of the officers who grabbed me by the throat, threw me down to the floor, and proceeded to kick me in the head, chest, and testicles. A stick was then jammed under my arm, and my arm was completely twisted around. . . . I was then dragged down the floor, pulled by the manacles which were on my wrists and kicked as those officers threw me into a cell.[12]

The trouble with prisons, someone has observed, is the character of the inmates. It might be added that part of the trouble with them may be attributed to the actions of the guards and other personnel. But there is an underlying trouble with all of law enforcement, a trouble which makes it belong to the nether world whatever success may attend particular reforms which can be conceived.

The trouble arises from the use of *force,* a word which is surely not accidentally embedded in law en*force*ment. It is the presence of force which makes it necessary to arrest and confine people accused of crimes, or have them post bond to secure their presence in court. It is the power of the court to take life, liberty, and property which makes men dread to come before it and requires drastic measures to assure their presence, even when these measures necessarily are productive of injustices. The fear of these things naturally enough results in lying, evasion, and hiding out, and such truth as is ever obtained much of it will come by an assumption of guilt.

If men are to be held against their will, there are some inescap-

[12] *Ibid.,* 491-92.

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able accompaniments: strict rules, punishments for violators, and indignities. Jails require jailers, prisons require guards, and force is in some ineradicable degree brutal. Prisons do not stay reformed; policemen tend to behave as they always have, and crime and punishment retain their seedy, unsavory, and oft times grisly character. Because, well, because the use of force is man's lowest form of activity.

Even so, law enforcement can have a high purpose. Government is necessary, and that is just another way of saying that there must be a body charged with the exclusive power of exercising force within its jurisdiction. Those who enforce the law need the respect, awe, and even sympathy of the citizenry. Theirs is a difficult, dangerous, and often demoralizing activity which inescapably involves some injustices. The high purpose of law enforcement is to minimize the use of force in society. To that end, it must establish the best approximation of justice possible, given its inherent limits.

Restrict Government to Defensive Force Only

What this means can now be put simply and directly. If government is to minimize the use of force, it must not be the *originator* of force. Government must restrict itself to the *defensive* use of force. The origin of government's exercise of force is the law. The laws must be restricted to defense against force arising from individuals and groups. We cannot rely upon government to transform society, to reform it, remake it, or whatever. When we do, government becomes the originator of force, and, instead of minimizing force it spreads it and makes it endemic. "Social justice," as it has been called, cannot be achieved by government because the more it attempts to do the more it spreads injustices inherent in the exercise of force. Reformers might well wish to make prison more attractive, for the thrust of the general reform effort is to confine all of us within strict rules, provide punishments for violators, and heap indignities upon us.

There used to be a newspaper cartoon entitled "There ought to be a law." It dealt, as I recall, with those annoyances and aggravations which we encounter in our daily rounds. Probably, it was meant to be humorous, though it would make a good study to review the cartoons to see if many of the suggestions have not been made into law today. In any case, the monumental task confronting us today can best be described in the opposite way: "There ought *not* to be a law." Many of the ills afflict-

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ing law enforcement today – the huge number of arrests, the crowded jails, the lengthy wait before trial or disposition of cases, the crowded prisons, the lawlessness and loss of respect for the law – are directly attributable to the plethora of laws on the books.

Solutions Other than Laws

That there ought not to be a law against many things is the appropriate conclusion that Judge Forer has drawn from her survey of the state of the law today. She says, in part,

> . . . The overuse of law and legal methods has failed to solve the problems. Instead it has resulted in an endemic contempt for all law. . . .
>
> Equal justice under law is, I believe, a goal worth pursuing. It can be achieved only if the legal structure is simplified and made accessible to all people, if the courts are limited to the resolution of conflicts and disputes within their capacity to decide, and if the aim of justice to treat similarly situated individuals equally is adhered to. *The law should abandon its efforts to restructure the economic and social order and modify behavior of individuals.* The limited aim of securing equal justice is a difficult and taxing goal to attain. It is a task sufficient for any single institution. . . . Equal justice cannot be even dimly approximated if law is utilized in an effort to provide all or a major part of the correctives, changes and controls required by our complex and diverse society.[13]

If one may venture to supplement so eloquent a plea, its direction is this: Wherever possible, means should be sought to resolve conflicts, inhibit offenses, and deal with problems without recourse to law. Law should be the last resort, and then only on matters with which it can deal. The law is not suited, for example, to settling labor disputes, to running businesses, to laying down rules for schools, or thousands of other things. All the time spent on cases in which courts are not really competent is time taken away from those who must look to the courts for justice.

There ought not to be a law, then.

There ought not to be a law to govern matters which have their own natural order, as in economics.

There ought not to be a law when other organizations or agencies can deal more effectively with the issues involved.

There ought not to be a law in which government originates the force.

There ought not to be laws with stiff penalties for petty offenses.

There ought not to be laws attempting to reconstruct society.

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[13] Forer, *op. cit.*, pp. 335-36. Emphasis added.

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There ought not to be a law fixing interest rates on loans.

There ought not to be a law prescribing box sizes for corn flakes.

There ought not to be a law compelling school attendance.

There ought not to be a law requiring employers to pay women the same as men or men the same as women for equal work.

There ought not to be an antitrust law.

There ought not to be a minimum wage law.

There ought not to be a law prescribing the distance between rungs on ladders.

There ought not to be a law compelling the bussing of children to distant schools.

There ought not to be a law compelling "contributions" to social security.

There ought not to be a law restricting the amount of political contributions.

There ought not to be a law requiring the use of metal pipes for plumbing.

There ought not to be a law. . . .

IDEAS ON LIBERTY

Majority Approval

LIBERALISM realizes that the rulers, who are always a minority, cannot lastingly remain in office if not supported by the consent of the majority of those ruled. Whatever the system of government may be, the foundation upon which it is built and rests is always the opinion of those ruled that to obey and to be loyal to this government better serves their own interests than insurrection and the establishment of another regime. The majority has the power to do away with an unpopular government and uses this power whenever it becomes convinced that its own welfare requires it. In the long run there is no such thing as an unpopular government. Civil war and revolution are the means by which the discontented majorities overthrow rulers and methods of government which do not suit them. For the sake of domestic peace liberalism aims at democratic government. Democracy is therefore not a revolutionary institution. On the contrary, it is the very means of preventing revolutions and civil wars. It provides a method for the peaceful adjustment of government to the will of the majority. When the men in office and their policies no longer please the majority of the nation, they will – in the next election – be eliminated and replaced by other men espousing different policies.

LUDWIG VON MISES, *Human Action*

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Adam Smith and the Invisible Hand

EDMUND A. OPITZ

WE CELEBRATE in 1976 the bicentennial of two significant events, the signing of the American Declaration of Independence, and the publication of *The Wealth of Nations* by Adam Smith.

Smith had made a name for himself with an earlier volume entitled *Theory of the Moral Sentiments,* published in 1759, but he is now remembered mainly for his *Wealth of Nations,* on which he labored for ten years. *The Wealth of Nations* sold briskly in the American colonies, some 2,500 copies within five years of publication, even though our people were at war. This is a remarkable fact, for there were only three million people living on these shores two centuries ago, and about one-third of these were Loyalists. In England, as in the colonies, there were two opposed political factions—Whigs and Tories. The Tories favored the King and the old regime; the Whigs worked to increase freedom in society. Adam Smith was a Whig; the men we call Founding Fathers were Whigs. There was a Whig faction in the British Parliament and many Englishmen were bound to the American cause by strong intellectual and emotional ties.

Adam Smith's book was warmly received here, not only because it was a great work of literature, but

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also because it provided a philosophical justification for individual freedom in the areas of manufacture and trade. The colonies, of course, were largely agricultural; but of necessity there were also artisans of all sorts. There had to be carpenters and cabinet makers, bricklayers and blacksmiths, weavers and tailors, gunsmiths and bootmakers. These colonial manufacturers and farmers had been practicing economic freedom all along; simply because the Crown was too busy with other matters to interfere seriously. There were numerous laws designed to regulate trade, but the laws were difficult to enforce, and so they were ignored.

Mercantilism

The nations of Europe at this time embraced a theory of economic organization called "Mercantilism." Mercantilism was based upon the idea of national rivalry, and each nation sought to get the better of other nations by exporting merchandise in exchange for gold and silver. The goal of Mercantilism was the enhancement of national prestige by accumulating the precious metals, but the goal was not nearly so significant as the means employed to reach it. Mercantilism was the planned economy *par excellence;* the nation was trussed up in a strait jacket of regulations just about as severe as the controls imposed today upon the people of Russia or China. The modern authoritarian state, of course, has more efficient methods of surveillance and control than did the governments of the seventeenth and eighteenth centuries, but the basic idea is similar.

Take the theory of Mercantilism and boil it down. What do you get? You get political control over what you eat. Now, if someone holds the power of decision over you as to whether you eat or starve, he's acquired considerable leverage over every aspect of your life; you do not bite the hand that feeds you! If someone controls your livelihood, you do his bidding, or people start talking about you in the past tense!

Mercantilism, in short, is the prototype of today's totalitarian state, where government – by controlling the economy – exerts a commanding influence over people in every sector of their lives.

The major theme of *The Wealth of Nations* has to do with the interaction between government and the economic order. The theory of Mercantilism held that government must control and manage the economy, else production would be chaotic and the right people would not be properly rewarded. Present-day collectivists concur; they want a national plan which taxes away

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about 40 per cent of the peoples' earnings in order to redistribute these billions of tax dollars to politically selected individuals and groups.

Questions of Political Power

The actions of the redistributive state – call it the welfare state if you prefer – are political actions. From ancient times to the present, every political theorist – except the Classical Liberals – tried to frame answers for three questions.

The first question was: Who shall wield power? Whether the structure took the form of a monarchy backed by divine right or a democracy based on the so-called will of the majority, it was essential that power be wielded by the small group thought most fit to exercise rule. The ruler's job is to program our lives toward the achievement of national goals. But it was never power simply for power's sake; it was political power for the sake of the economic advantage power bestows.

So the second question is: For whose benefit shall this power be wielded? The court at Versailles is a good example of what I mean. The French nobles favored by royalty lived rather well, although they'd rather be caught dead than working. In virtue of their privileged position in the political structure, they got something for nothing. I daresay that each of you can think of parallel instances operating today, even in our own country. Now, when someone in a society gets something for nothing through political channels, there are others in that society who are forced to accept nothing for something! And the third question, of course, is: At whose expense shall this power be wielded? Somebody must be sacrificed.

Let me repeat these three questions, for they provide an apt key to many political puzzles: Who shall wield power? For whose benefit? At whose expense? One might put this in a formula: Votes and taxes for all; subsidies and privileges for us, our friends, and whoever else happens at the moment to pack a lot of political clout.

The American system was to be based upon a different idea. It took seriously the ideas of God, the moral order, and the rights of persons. It discarded the notion of using government to arbitrarily disadvantage a selected segment of society, and instead embraced the ideal of equality before the law. Government, in this scheme, functioned somewhat like an umpire on the baseball field. The umpire does not write the rules for baseball; these have emerged and been inscribed in rule books over the years and they lay down the norms as to how the game shall be played.

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If any person is on the field it is to be presumed that he has freely chosen to be there, and in his thoughtful moments he knows that the game cannot go on unless there is an impartial arbiter on the field to interpret and enforce last-resort decisions – such as ball or strike, safe or out at first. Government, similarily, enforces the previously agreed upon rules.

This is the political theory of Classical Liberalism, and it marks a radical departure from all other political theories. It declared that the end of government is justice between persons, and maximum liberty for everyone in society. "Justice is the end of government," wrote Madison in the 51st *Federalist Paper;* "it is the end of civil society."

Government Is Force

The point to be stressed is that the essential nature of government – its license to resort to force at some point – is not changed by merely altering the warrant under which government acts. Divine right or popular sovereignty – it makes no difference to this point: Government is as government does.

Governmental action is what it is, no matter what sanction might be offered to justify what it *does*. The nature of goverment remains the same even though its sponsorship be changed from monarchial power to majority rule. Government always acts with power; in the last resort government uses force to back up its decrees. The government of a society is its police power, and the nature of government remains the same, even when office holders are elected by a vote of the people. And when the police power – government – is limited to keeping the peace of the community by curbing those who disturb the peace – criminals – then there is maximum liberty for peaceful citizens.

"The history of liberty," wrote Woodrow Wilson in 1912, "is the history of the limitations placed upon governmental power." The 18th century Whigs achieved a limited monarchy in England, and a constitutional republic for the thirteen colonies. This was a victory for freedom over tyranny. Such battles, however, do not stay won, and in our time many people have lost their freedom.

Twentieth century political despotism is much more extensive and severe than the monarchial rule of Smith's day, which is why *The Wealth of Nations* is still a relevant book. Smith demonstrated that a country does not need an overall national plan enforced upon people in order to achieve social harmony. This is not to say that a peaceful, orderly society comes about by accident, or as the result

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of doing nothing. Certain requirements must be met if people are to live at peace with their neighbors. It is required, first of all, that there be widespread obedience to the moral commandments which forbid murder, theft, misrepresentation, and covetousness. The second requirement is for a legal system which secures equal justice before the law for every person. When these moral and legal requirements are met, then the people will be led into a system of social cooperation under the division of labor "as if by an invisible hand."

Adam Smith liked this metaphor of "an invisible hand" and used it in *Theory of the Moral Sentiments* as well as in *The Wealth of Nations*. Every person, Smith writes, employs his time, his talents, his capital, so as to direct "industry that its produce may be of the greatest value. . . . He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . He intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intentions." Smith concludes this passage by adding, sardonically, "I have never known much good done by those who affected to trade for the public good."

What is Adam Smith telling us? He is saying that if we operate within the proper moral and legal framework, employing our God-given talents to the limit of our powers, then we will find individual fulfillment directly and get the good society as an unexpected bonus.

Equality, Liberty, Justice

The Wealth of Nations is generally regarded as a work on economics, but Smith did not think of himself as an economist. Smith was a professor of Moral Philosophy at the University of Glasgow, where he lectured on ethics, rhetoric, jurisprudence, and political economy. Ask Adam Smith for a thumbnail description of the system of political economy he believed in, and he'd reply that he advocated "the liberal plan of equality, liberty and justice."

These three virtues together characterize the free society, and in fact they are but three facets of a single truth. Equality, as the term is used in the Declaration of Independence, and here by Adam Smith, means the abolition of privilege – one law for all men alike because all men are one in their essential humanity. Because all people are created equal, it is

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wrong for government to play favorites and bestow advantages on some at the expense of others. The goal is "equal and exact justice for all men, of whatever state or persuasion" – to quote from Jefferson's First Inaugural. Justice is equality before the law, and this describes a society where each person may freely pursue his own goals, provided he does not infringe the equal right of all the others to pursue theirs.

You're all familiar with the division of society into a public sector and a private sector; call the former the governmental, coercive sector, if you prefer, and the latter the voluntary sector. When the governmental sector expands, the voluntary sector contracts, and vice versa. The efforts of the old-fashioned Whigs and the Classical Liberals were directed toward the goal of a government limited to maintaining the peace of the community and assuring justice and fair play among people – the umpire role in society. This expanded the voluntary sector and gave us the ideals of freedom of speech, freedom of the press, and religious liberty. And in 1776, Adam Smith provided a rationale for freedom of economic action.

One of the large questions which every society has to face and resolve is: How shall the economic rewards be allocated? Food, clothing, shelter – as well as things like automobiles, television sets, refrigerators, concerts, and trips to Europe – are in limited supply. How shall we "divvy up" the available quantity of these goods? Who gets what?

We know how it was under the old regime: those who wielded political power used it for the economic advantage of themselves and their friends, at the expense of those who lacked political power. There were Haves and Have-nots, and the Haves obtained their wealth by seizing it.

But when men are free, economic rewards are parceled out in a different manner. The free society allocates rewards in the market place; the Haves get that way by pleasing the customers, at which game some are more successful than others.

Consumer Choice

Every one of us in a free society is rewarded in the marketplace by his peers, according to the value willing buyers attach to the goods and services he offers for exchange. This marketplace assessment is made by consumers who are ignorant, venal, biased, stupid; in short, by people very much like us! This does seem to be a clumsy way of deciding how much or how little of this world's goods shall be put at this or that

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man's disposal, and so people of every age look for an alternative.

There *is* an alternative, and it runs something like this: People are too dumb to know what is good for them, and they fall easy victims of Madison Avenue. Therefore, let's invite the wise and good to come down from Olympus to sit as a council among men, and we'll appear before them one by one, to be judged on personal merit and rewarded accordingly. Then we'll be assured that those who make a million really deserve it, and those who are paupers belong at that level; and we'll all be contented and happy. What lunacy! The genuinely wise and good would not accept such a role, and I quote the words of the highest authority declining it: "Who made me a judge over you?"

The Alternative Is Worse

The market-place decision that this man shall earn twenty-five thousand, this one ten, and so on, is not, of course, marked by supernal wisdom; no one claims this. But it is infinitely better than the alternative, which is to recast consumers into voters, who will elect a body of politicians, who will appoint bureaucrats, who will "divvy up" the wealth by governmental legerdemain. This mad scheme backs away from the imperfect and crashes into the impossible! There are no perfect arrangements in human affairs, but the fairest distribution of material rewards attainable by imperfect men is to let a man's customers decide how much he should earn; this method will distribute economic goods unequally, but nevertheless equitably.

Parenthetically, it should be understood that the market does not measure the true worth of a man or a woman. If it did, we would have to rate all who make a lot of money as superior beings – rock music stars, producers of porno films, publishers of dirty books, television commentators, authors of best sellers – and they're not superior. To the contrary! But such people constitute only a tiny sector of the free economy, and they are a very small price to pay for the blessings of liberty we enjoy.

In a free society, those who earn more than the national average are entitled to enjoy their possessions, for they've gained them in a system of voluntary exchange; the well-being the Haves enjoy is matched by the well-being they have bestowed upon other people – as these other people measure it. There is genuine reciprocity in the free society. But opponents of the market are blind to its built-in mutuality. The Left, therefore, will make a determined effort to instill a guilty conscience in every-

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one who lives above the poverty level. They use Karl Marx's exploitation theory which alleges that the man who works for wages produces, over and above his wage, a "surplus value" which is garnisheed by his employer. To be employed – they tell us – is to be exploited, and the whole capitalist class should feel guilty for denying the working class its due!

"Surplus Value" Exposed

This naive and vicious notion was demolished even while Marx still lived, by the economist, Böhm-Bawerk – founder of the Austrian School. Böhm-Bawerk did it again in a second book, in 1896, with the result that the exploitation theory is not now promoted even by Communist theoreticians. But the "surplus value" idea does intensify feelings of envy and guilt, so it is still useful as propaganda.

The free economy sounds pretty good in theory, you might say, but what does it do for the poor? Well, it takes most of them out of that category! A free people becomes a properous people. To the extent that the free economy has been allowed to operate in a nation, in like measure has the free economy elevated more people further out of poverty, faster, than any other system.

It is easy to see why this is so. Poverty is a lack of certain things. A man is poor whose supply of food, clothing, and shelter are meager; he has only one shabby suit, his diet is macaroni and cheese, and he lives in a sparsely furnished room. A man moves out of poverty only as he acquires better clothes, a more varied diet, and then expands into an apartment or a house. People are well off or less well off according as they command more or less of the things which are manufactured or grown. This is axiomatic, and it follows that poverty is overcome by increased productivity and in no other way. America is the world's most properous nation because America has been the most productive nation; we have more wealth because we produce more wealth.

Who has the biggest stake in the free economy? Who has most to lose if the free economy lapses into the planned state? Not the rich; the poor! The corporate executive type; the shrewd, energetic, hard-driving, far-seeing, imaginative, nimble, smart, tough executive will make a bundle under any system. In Russia he'd be a commissar. It's the not so smart, not so energetic, not so imaginative, plodder type who has the biggest stake in the free society. This description fits most of us, and there is a place for us in the free society, where we are rewarded

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quite handsomely. We'd be serfs, or worse, in most other societies – if we survived liquidation!

When people are free, there is no guarantee that they'll use their freedom wisely. Freedom of speech does not assure witty conversation, eloquent preaching, or lofty utterance. Most talk, as a matter of fact, is banal and shallow and gossipy; but no one on this account suggests we put a political ban on free speech. We have freedom of the press, with the result that we are knee deep in triviality and garbage. But we support freedom of the press anyway, knowing that a governmentally controlled press would be far worse. Freedom of religion opens the door to all kinds of weird cults, as well as to exotic brands of superstition and magic; but no one advocates that we repeal the First Amendment and set up an American National Church!

That is what freedom is all about – putting up with things we don't like, and living with a lot of people we can barely stand! We must support the processes of freedom even when we cannot endorse every one of the products of freedom. And that goes for freedom of economic enterprise as well – as Adam Smith advised 200 years ago.

Now, neither the free economy nor its business sector can guarantee to every person full realization of his potential talents; this is a matter for individual decision. All the free society can promise is maximum and equal opportunity – and this is all the guarantee we need.

Adam Smith and
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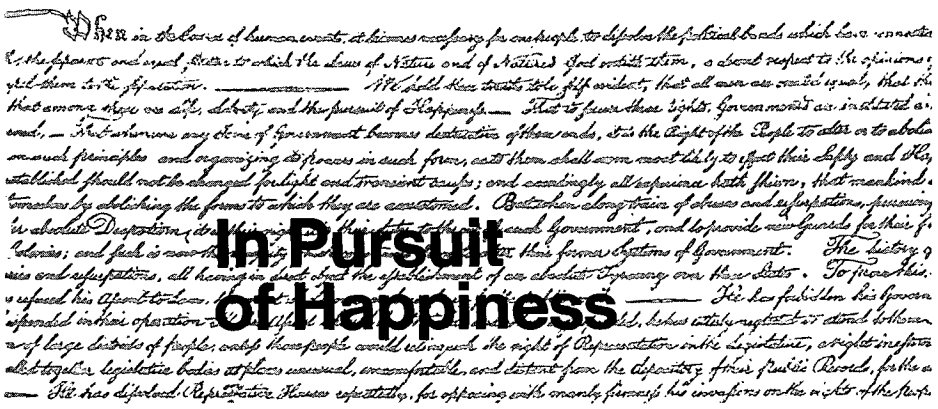

In Pursuit of Happiness

RIDGWAY K. FOLEY, JR.

THE DECLARATION OF INDEPENDENCE affirms that each individual human being, by his essential nature, possesses certain fundamental or "inalienable" rights including, in Thomas Jefferson's haunting phrase, the right to "life, liberty and the pursuit of happiness."[1]

One readily can perceive and contemplate the personal right to live a life in a nonaggressive manner, free from external interference or "man-concocted restraints".[2] Although it requires greater effort to defend human liberty, the abstract concept of a human actor unfettered by other persons in seeking his particular destiny can be assimilated by most thinkers. The third part of the trilogy – the pursuit of happiness – poses the greatest conceptual problems, yet analysis reveals it to inhabit an equally fundamental and interrelated station with the first two parts of the trinity. Indeed, as this essay explores the issue, the "pursuit of happiness" serves to illuminate the basic meaning of freedom.

In many a litany of personal rights, one observes the triumvirate of "life, liberty and property".[3] Surely, the concept of "property rights" ranks among the foremost of misunderstood and maligned tenets. Does "property" in this sense equate with the "pursuit of happiness"? Correctly understood, the term "pursuit of happiness" explains the full meaning of *property rights*.

Property

A part of the confusion and ambivalence normally attendant upon a study of property rights evolves from the failure to realize that the

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phrase contains two words, and that meaning must attach to both "property" and "rights" in order to clarify the speaker/writer's postulate.

Traditionally, we attribute to property a definition related to things, corporeal or incorporeal objects existing in the real world: (1) land (real property), or (2) livestock/goods (personal property). Yet, such a simplistic definition unduly limits adequate comprehension of the nature of man, his rights and his liberties. *Property* describes objects, to be sure, but *property rights* concern the *relationship* of an individual to things in the universe. Property itself possesses no rights: can one really impute *rights* to a homestead, or a blossom, or an automobile? By definition, a *right* consists of a pre-eminent claim of one human being to a certain state of affairs in contrast to other human beings; thus, nonhuman objects cannot possess rights by the very terms employed.[4]

The Concept of Property Rights presupposes a concept of value.[5] Value refers to a subjective individual internal scale of preferences between alternatives. Human action forms a fundamental reality: man acts; he chooses between alternatives;[6] he rests his choices upon (a) his perception of reality and (b) his subjective value judgments or individual scale of preferences. James Madison, a diminutive man with a magnificent insight, touched upon this thought shortly after the birth of the Republic:

> This term [property], in its particular application, means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right, and *which leaves to everyone else the like advantage.*
>
> In the former sense, a man's land, or merchandise, or money, is called his property.
>
> In the latter sense, a man has a property in his opinions and the free communication of them.[7]

Thus myopia produces a view of property as visible things in the outside world; truth reveals property inherent in ideas, concepts and things of the mind. The laws concerning copyright, trademarks, and trade names rest upon this tacit knowledge.

Property Rights

Once we understand the breadth and scope of property, it remains imperative to examine the other half of the equation, the concept of property rights.

To merely state that property

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rights refer to the relationship of an individual to a *res* or an idea *vis-a-vis* other human actors offers scant insight into the salient nature of the doctrine under examination. Incisive inquiry demands evaluation of the depth and sweep of the relationship. Generations of law students learned to visualize rights in property as a bundle of sticks, with each succeeding conveyance, transfer or limitation depleting the original bundle by one or more branches. A California Superior Court judge aptly pointed out the two broad aspects of property rights when he noted the attributes of *dominion* and *exclusion*[8]. A mighty skinny package of limbs remains if one's dominion over an automobile, a book, or some acreage does not countenance the legal exclusion of other men from its bounds and borders. Likewise, the transitory "right" to exclude one or more individuals from a given object means little if the party performing the exclusion possesses no personal right to enjoyment of the thing in question. In the broad sense, property rights refer to the legally-sanctioned power of an individual to possess, use, own and exclusively enjoy the *res* or idea under discussion.[9]

Rights represent absolute power to seek an end. The concept of rights cannot tolerate an erosion without destruction of the concept *per se*. In this sense, rights which flow from nature, or the universal truth, or reality, must be perceived as *absolute*. A right which exists in fantasy, or ephemerally, or at the whim of some other actor, does not deserve the appellation.

Consider these strict normative statements in the ambience of property rights. Suppose A owns Blackacre: we commonly announce that he possesses a property right therein. The meaning: A can exclude all trespassers from Blackacre; he can employ it to grow crops or to feed cattle; he can allow it to deteriorate into wrack and ruin, if that be his pleasure; he can open it to the world, or he can bar all others and live in the splendid seclusion of a hermit. Suppose, however, Blackacre exists in Jefferson, a state which engages a planner and embarks upon the device of land-use control and zoning. In so doing, Jefferson (the collective force of mankind assembled in Jefferson) restricts the permissible uses to which A may put Blackacre. It becomes a contradiction in terms to speak of A's property rights in Blackacre: A's "rights," now mere illusions, depend upon the whimsey of others.[10]

One might urge, quite reasonably, that restriction of a single aspect of one's rights in property leaves the remainder unsullied: in the foregoing example, Jefferson's

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zoning ordinance might merely prohibit A from raising sugar beets on his land or from constructing an edifice more than three stories high; all other sticks in A's bundle of rights regarding Blackacre would remain extant. This argument ignores two interrelated factors: (a) the concept of fundamentals and (b) the idea of precedent. If property represents a *right,* it must remain untrammeled, secure in its entirety, else it fails to meet the definition of "right". The concept, as well as the definition, represent a fundamental, inalterable principle and, as the late Dr. F. A. Harper made manifest, fundamental principles can be breached but not compromised.[11]

Again, contemplate the effect of precedent, the human tendency to look over one's shoulder and to pattern current conduct upon past action. Our land-use example serves us well in this endeavor, for land-use planning, commenced as simple "agreeable" zoning ordinances overtly designed to "keep out harmful and obnoxious industries", developed into a hydra-headed monster encompassing comprehensive plans which detail and manage the every individual action of a community, county, state or region. Refer to A and his Blackacre; if we grant Jefferson the power to take a single twig from A's bundle of rights, we set a dangerous intellectual and practical precedent for future incursions into private rights; each subsequent norm, grandly cast in eloquent language, designed to promote some hallucination labeled "public interest", and calculated to further the aims and ambitions of greedy, avaricious men holding power, feeds upon each past invasion as a justification for further destruction of human rights.

The Dimension of Property Rights — Unbounded Dominion

The absolute nature of property rights discloses the salient truth that the individual human actor should possess unbounded dominion and exclusive control over property which he owns. Correct comprehension of this hypothesis compels consideration of three related issues which should serve to illuminate the basic precept.

First, some analysts suggest a rule resembling the following: each individual should enjoy a right to life, liberty and property without restriction save that he grant an equal, reciprocal right to every other human being and not employ his property in an aggressive or deceitful manner. Properly understood, this explanation reiterates the former statement. The mere fact that one uses his property as a fraudulent or aggressive

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implement does not necessarily destroy his relation to that property. Property does not defraud or maim: human actors do. Hopefully, civilization has advanced beyond Anglo-Saxon times of the "bot" and "wergelt" where injured persons wreaked vengeance upon dumb beasts and inanimate objects which "caused" harm. If an individual fires a pistol and injures another, the proper remedy lies not in destroying the gunman's relationship to his weapon or the pistol itself, but rather in restricting his liberty as a means of societal protection and individual restitution. True, some systems of justice employ fines and penalties as a means of accomplishing retributive ends, thus forcibly altering human relationships to property; in this sense alone, the second definition may modify the former.

Second, the rule must be understood as containing an implied *caveat* that normative regulations pertain to living human actors, in the main. Legal philosophers have endured a long struggle over the issue of whether, and to what extent, a decedent may or should control the distribution of property. Statutes of Mortmain, the rule against perpetuities, and restraints upon testamentary alienation all express the human interest of removing the dead hand (Mortmain) from property which the survivors believe should belong to, and serve, the living. Testators, donors, and their counsel have proved similarly artful in circumventing some, if not all, of these restrictions by use of trusts, charitable gifts, nonprofit corporations, foundations and other artificial entities which extend beyond the normal human life span. Proponents of freedom should opt for the maximum donative liberty to possessors of property and should decry attempts to impair the transmittal of goods and ideas according to the owner's quirks and values.

Third, the concept of property must envision contractual freedom upon the part of the living possessor wholly consonant with the recognized power of the testator to bequeath or transfer possessions on his demise. The postulate of unfettered dominion and unqualified authority to exclude others necessarily demands recognition of the guaranty to every man that he may give, sell, transfer, maintain, keep or destroy his property as he sees fit so long as he does not thereby harm another person enjoying a concomitant right. The free society, in final analysis, rests upon the cornerstone of contract, the voluntary and unimpeded transfer and holding of ideas, goods and services.[12]

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The Meaning of Property

Property represents created value. Meaninglessness mars any reference to "property" possessing no value to any individual. Each human being evaluates tangible and intangible things upon his scale of preferences and acquires that upon which he places a subjective priority. Two attributes particularly distinguish man from other inhabitants of the earth: (1) the concept of moral choice, and (2) his power to create and assess value in objects.

Material things evince no property value apart from their relationship to one or more men. One cannot meaningfully say that a tree in a pre-human epoch possessed a value, or that some later resident of the earth enjoyed a property right in its now-nonexistent trunk, bark or roots. Oil existed in one form or another under the Arabian desert from pre-Cambrian times, yet it took on significance only with the advent of the modern industrial culture; prior to that event, man did not seek it; subsequent to that occasion, man (or some men) accorded it a place of value in the scheme of things.

Yet man's ability to assess value – to evaluate or judge the worth of things or concepts – cannot be divorced from his correlative attribute, the creation of value. Oil in Saudi Arabia represents no real value to a citizen of Nebraska or Norway without the application of human effort and ingenuity to extract, refine, transport, and deliver a usable and useful product to one who wishes to exchange something he has acquired or created for the product. Application of human abilities creates the value attached to property.

Man can acquire property by two discrete and disparate means: (1) he can create it directly by his own efforts, or indirectly by creating something of value to another person and trading with the other, or (2) he can annex it by coercive and agressive means. In simple language, man procures property rights by creative or by aggressive effort. No matter the mode of acquisition, property must be created by someone and valued by someone in order to fit the definition.

Indivisible Rights: Life, Liberty and Property

The draftsmen of the Declaration of Independence and the United States Constitution, like their philosophical predecessors such as John Locke, proclaimed the triumvirate of natural human rights – to life, liberty, and property – as if they formed three discontinuous virtues separated by both conceptual and actual barriers. In fact and in essence, the

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"natural rights" of life, liberty and property present different aspects of the same facade, as though one viewed the identical building from three different angles.

Recur to fundamentals. Every individual possesses a right to live his life unmolested by others so long as he works no force or fraud upon his neighbors, a right to chart his destiny by the particular stars he perceives.[13] Grant this premise and the corollaries discussed in this tract fall naturally and inevitably in place. From this fundamental axiom derives the right of each individual to free action, to liberty, since one cannot seek his own subjective ends if other men plot constraints which reduce or eliminate the full sweep of the actor's choice or pre-determine his ends.[14] Life means life lived to its fullest, given the person's nature and ability, untarnished by the forceful actions of others. Living without liberty offers a poor excuse for life. In like manner, the same fundamental premise begets a right in each man to retain or transfer, on his own terms, that which he creates or produces, "property rights" in the argot, since no one can be meaningfully free to live his life in quest of his goals if he cannot employ, enjoy, barter, donate or devastate that which he has created.

One must not tolerate any limitation on this basic postulate under the guise of state interest or public purpose, else the errors of miscomprehension of fundamentals and undesirable precedent, noted before, will ineluctably sully the integrity of the solemn doctrine. An advocate might disdain the power-nee-right to destroy created value, urging that the "world deserves a masterpiece" or some such tomfoolery. Neither the world at large nor any human being therein can morally stake a claim to that which another has produced. Recall the subjective nature of value and ask whether one could morally condemn Enrico Fermi if he had destroyed his notes and refused to disclose his findings which led to nuclear detonation: would "the world" be better served with or without his research? The right to property necessarily includes the right to use and dispose of those goods, services and ideas as the possessor sees fit.

This identity of rights underscores the fallacy inherent in the phrase that "human rights deserve a transcendent station when compared to property rights". Human rights *are* property rights, and property rights *are* human rights.[15] All other rights become worthless if the state or some individual or group of men possess an uncontrollable and pre-emptive power over the property of the

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owner.[16] Property rights mean the rights of a human actor to dominion and exclusive control over ideas or objects *vis-a-vis* other men and women: no more fundamental "human" right exists than the right to use and control things and thoughts so as to manage one's life and follow one's star. Freedom of speech appears spurious where the government prohibits private ownership of all placards, sound trucks, and meeting halls; freedom of press deteriorates into an empty semantic exercise where the state monopolizes newsprint and printing presses; anti-loitering laws can nullify a proclaimed freedom of association.[17] Edmund Opitz has put the matter precisely and succinctly from a slightly different perspective:

> Despotism does not merely seek to control the external conduct of men; it knows that men may conform externally even while swallowing the revulsion that seethes beneath the surface. Despotism, therefore, must seek to control men's ideas and their thoughts. Once this is accomplished, then each inner-directed man will control his own conduct willy-nilly in accord with the planner's blueprint.[18]

Property control thus wends its inevitable tracks to thought control, and thence to personal control.

Civil liberty and a right to life cannot exist, then, in the absence of an unabridged right to property, for one cannot be truly recognized as the skipper of his own life when he must exist at the whim and caprice of others.[19] Yet another facet of the truth of. indivisibility remains to be explored: the necessary interrelationship of human freedom between several individuals. In a word, my freedom depends on yours, and my property rights exist only so long as yours remain inviolate.[20] The invasion of a person's property, for whatever professed reason, destroys the fundamental inviolability of property generally and affords a pragmatic precedent for future coercive action.

Dean Russell aptly sums up the case for the indivisibility of liberty:

> Freedom is based on ownership. If it is possible for a person to own land and machines and buildings, it is also possible for him to have freedom of press, speech, and religion. But if it is impossible for a person to buy and sell land and other resources, then it is also impossible for him to have peaceful access to any effective means of disagreeing with the decision of his government. Thus my contention is that, in the final analysis, human freedom stands or falls with the market economy of private ownership of the means of production and distribution.[21]

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And Nobel Prize winner, Friedrich A. von Hayek, adds a salient *postscript:*

> What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not.[22]

The Pursuit of Happiness

Return now to the resonant Jeffersonian phrase – the pursuit of happiness – and observe how neatly it fits with the philosophy of freedom and individual property rights discussed.

Ask first: What is happiness? No universal response obtains save in the form of tautology, and with good reason, for happiness depends solely upon the subjective values of each unique human creature. For one it may be lolling on the gentle beaches, for another working on a composition, for a third praising God, for yet another basking in the ownership of material things. Each person creates his own happiness or melancholy according to his character and that ever-present internal scale of preferences and choices between alternatives. Property may afford the means of achieving happiness, just as it may constitute the condition itself.

Note secondarily, the intentional employment of the term "pursuit". No one can, or should attempt to, guarantee a happy issue out of the afflictions of this world. Correlative with man's frailties and finite nature lies the undeniable realization that things do go wrong, that plans come a cropper, that friendships go awry. Law, properly utilized in accordance with the philosophy of freedom, can only guarantee man the liberty to *seek* happiness, whatever his goals, so long as he does not trample upon the equivalent rights of others.

Accordingly, the phrase "life, liberty and the pursuit of happiness" truly affords mankind the opportunity to live each solitary life apart from the external bars and restraints imposed by other men, to create and distribute value in the manner and mode which harmonizes with the creative talents and purposes, and to pursue those values which carry meaning to the unique being holding the particular concept of worth. Thus, the multifaceted language revolves about a single truth: Man lives better and more nearly achieves his potential if other men leave him unhindered.

When Worlds Collide

It remains to discuss the harmony of human values and to consider the adjustment of conflicts

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resulting from competing human drives.

Initially, the collision of rights is more apparent than real.[23] Proper analysis normally defines away the problem.[24] Consider the current miasma of land-use control. The advocates envision planning and zoning as a means to secure a pleasant environment for the citizenry, away from dust and fumes and ugly edifices. Such a reasonable desire, until viewed under the microscope of rigorous analysis. Remember the salient and valid proposition that property values, like all values, are subjective: what is good or beautiful or desirable depends wholly upon the intricacies of the individual perceiver. If each of us conjured up the form of the perfect "lot" and committed our concepts accurately to paper, a comparison would reveal *no* concatenation of forms: each one of us would provide a different perception of the idea.[25]

Application of these fundamentals to the present question of land-use planning reveals that each and every instance of land-use planning and zoning, no matter how phrased, devolves to one simple proposition: one or more people who do not own specific land enjoy control of the political apparatus which can be employed to require other people to use (or not to use) their earned value (land, in this instance) in some manner not desired by the owners. In short, one person or group imposes their subjective values of appropriate land use upon other persons possessing differing subjective values. One man's green belt amounts to another man's eyesore. Behind the pretty mask of "public interest" may lurk pure, unfettered dictatorship. As to the ultimate justification – "public interest" – the public has no "interest"; groups of individuals have interests. The platitude of "public interest" merely cloaks the reality of forceful deprivation of rights by those enjoying political power against those lacking such regency.

Favor the Individual

Simply stated, where a man's rights are threatened, especially by government action, this country should strike the balance in favor of individual control of individual action according to individual values.

In the further instance where an immediate solution to conflict does not seem readily apparent, disputes may be adjudicated in accordance with principles of freedom and *sans* irrational deprivation of property. The solution rests with the amazing elasticity of the common law, that ancient device of putting seemingly insolvable interpersonal rifts to an impartial

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judge and community jury for decision. In the past, the common law ofttimes resided upon basic common sense occasionally flavored with statist aberrations. The passage of time has accentuated the latter ingredient.

A free society demands a recognized mechanism for decision-making as well as an accepted body of rules for finally concluding squabbles. Men committed to freedom can simply design both institutional character and narrative content by reflecting upon the definition, processes and issues of liberty. The law of riparian rights or prior appropriation, aptly modified to reflect the fundamentals of freedom, can safely, swiftly and securely protect an abutting owner from one who pollutes a stream, just as the ancient rules of trespass and nuisance, garbed in modern dress, can evaluate and settle altercations between adjoining property owners when, for example, noise, fumes, particulates or soot waft from Blackacre to Whiteacre.[26]

Respect for free choice and adherence to the concept that each man should be accorded the right to live his life unrepressed by other men or their external hamstrings so long as he does not initiate aggression or fraud against another must undergird any system of common law. Achievement of such a structure will lay the foundation for the pursuit of happiness envisioned by the founding fathers.

• FOOTNOTES •

1 Declaration of Independence of the United States of America.

2 I owe recurrent gratitude to Leonard Read for this succinct, penetrating and happy phrase. See Read, Leonard E., "Justice versus Social Justice", *Who's Listening?* (The Foundation for Economic Education, Inc., Irvington-on-Hudson, New York 1973) 93, et seq.

3 E.g., Constitution of the United States, Amendments V, XIV.

4 Poirot, Paul L., "Property Rights and Human Rights", 2 *Essays on Liberty* 79 (1954). See Bayes, William W., "What is Property?" 20 *Freeman* (No. 7) 392, 394 (July 1970).

5 See Foley, Ridgway K., Jr., "The Concept of Value in Ethics and Economics", 25 *Freeman* (No. 2) 115-123 (February 1975).

6 See Foley, Ridgway K., Jr., "Choice or Chains", 24 *Freeman* (No. 4) 199-204 (April 1974).

7 Madison, James, IV *Works of Madison* 478-480 (March 27, 1792); reprinted in 22 *Freeman* (No. 4) 248-250 (April 1971). See also Bayes, Note 4, *op. cit.*, at 347.

8 Palmer, William J., "Prophets, Jurists, and Property", 17 *Freeman* (No. 2) 92, 100 (February 1967).

9 Bayes, Note 4, *op. cit.*, 20 *Freeman* at 393.

10 Palmer, Note 8, *op. cit.*, 17 *Freeman* at 95.

11 Harper, F. A., "Morals and Liberty", 21 *Freeman* (No. 7) 426, 430 (July 1971).

12 The doctrine and theory of contractual rights and obligations in a free society deserves separate and thoughtful analysis, beyond the scope of this treatise.

13 A more ample development of this

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theme appears in Foley, Ridgway K., Jr., "A Libertarian Looks at Life" (unpublished manuscript).

14 See Foley, Ridgway K., Jr., "The Rationale for Liberty", 23 *Freeman* (No. 4) 222-229 (April 1973).

15 A thorough explanation of this truth, and a clear exposition of the human rights/property rights false dichotomy, appears in Rothbard, Murray N., "Human Rights are Property Rights", 6 *Essays on Liberty* 315 (Foundation For Economic Education, Inc., Irvington-on-Hudson, New York 1959); Poirot, Paul L., "Property Rights and Human Rights", *supra*, 2 *Essays on Liberty* 79 (Foundation for Economic Education, Inc., Irvington-on-Hudson, New York 1954); Rothbard, Murray N., *For a New Liberty* (The Macmillan Company, New York, 1973) 43-46.

16 Palmer, Note 8, *op. cit.* p. 101; *Home v. Los Angeles County Flood Control District*, 25 Cal2d 384, 153 P2d 950 (1944).

17 For more detailed excursions into these subjects, see, e.g., Summers, Brian, "Economics and the Press", 23 *Freeman* (No. 9) 564-565 (Sept. 1973); Barger, Melvin D., "Let the People Own the Airwaves", 10 *Essays on Liberty* 283 (Foundation for Economic Education, Inc., 1963); Russell, Dean, "Freedom of the Press", 12 *Essays on Liberty*. 404 (Foundation for Economic Education, Inc., 1965).

18 Opitz, Edmund A., "Some Thoughts on Censorship", 16 *Freeman* (No. 6) 56, 57 (June 1966).

19 Palmer, Note 8, *op. cit.* p. 95.

20 See Foley, Ridgway K., Jr., "The Texture of Society" (unpublished manuscript); see also Bayes, Note 4, *op. cit.* at 398-400.

21 Russell, Note 17, *op. cit.* at 490. See also, Russell, Dean, "Freedom Follows the Free Market" 10 *Essays on Liberty* 198, 200-201 (Foundation for Economic Education, Inc., Irvington-on-Hudson, N. Y. 1963) and Russell, Dean, "Basis of Liberty", 12 *Freeman* (No. 7) 9 (July 1962).

22 Hayek, Friedrich A. von, *The Road to Serfdom* (University of Chicago Press, Chicago 1964) 103-104. Of course, correctly viewed, no one exists without property, for each of us possesses his own mind and creates his own value, however slight in the eyes of others.

23 For a full discussion, see Foley, Ridgway K., Jr., "The Chimera of Rights in Collusion" (unpublished manuscript).

24 See Rothbard, *For a New Liberty*, note 15, *op. cit.*

25 Rogge, Benjamin A., "No New Urban Jerusalem," 3 *Imprimis* (No. 9) 1 (September 1974).

26 I do not propose to lengthen this essay unduly by development of this topic which, after all, deserves definitive and separate treatment. I have viewed one of several aspects of the question in the essay cited at Note 23, *op. cit.*

IDEAS ON LIBERTY

The Guaranteed Life

WHATEVER the motives behind a government-dominated economy, it can have but one result, a loss of individual liberty in thought, speech and action. A guaranteed life is not free.

A free man has a value to himself and perhaps to his time; a ward of the state is useless to himself – useful only as so many foot-pounds of energy serving those who manage to set themselves above him.

The guaranteed life turns out to be not only not free – it's not safe.

MAXWELL ANDERSON

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W. H. HUTT is a paradox. He is a man of extremely clear vision, but he is a most difficult writer. His *Individual Freedom,* which consists of selected essays edited by Svetozar Pejovich and David Klingaman (Greenwood Press, Westport, Connecticut, $15.95), presents the case for classical liberalism in an unchallengeable way: the parts all fall into place to make for a most consistent whole. But it is a struggle to deal with such observations as "the entrenchment of the non-discriminatory principle would undoubtedly precipitate an enormous disinvestment of the capital invested in what the authors call 'organization aimed at securing differential gains by political means'." What he is saying is that if governments were to stop favoring special interests, money would flow into areas that would be the most productive for society as a whole. It is all clear enough, but you have to work at translating technical language, sometimes for pages on end.

The reader's reward for persistence, however, is great. What one gets in these essays is a view of political economy that shows how we have gone wrong by departing from the old Adam Smith idea that government should limit itself to the defense of the realm (a military force to guard borders, a police force to handle internal lawbreakers), a court system to provide justice, and the making of non-discriminatory rules under which private entrepreneurs can coordinate the economy. Add a concern for public health (the individual has a right to protection against disease spread by the unconcern of others) and you just

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about have the case for a free society dominated by consumer sovereignty.

As the editors of these essays point out, Hutt is skeptical of the idea that the government is a group of people who can be entirely disciplined by the ballot box. People are selfish and short-sighted, and they will vote themselves special discriminatory privileges if they can find a way to do it. So it is axiomatic that there must be constitutional checks on special interest groups and their log-rolling political representatives. Hutt would outlaw any form of special interest legislation except for aid to the poor and disabled. But he would not extend the vote to anybody who gets special aid from government. The poor and disabled, if they have the right to legislate on their own behalf, can become a pressure group as fearsome as any.

On Being Realistic

Such an uncompromising devotion to pure classical liberalism is not considered "realistic" in this day and age. It was Hutt's lack of "realism" that caused him to become *persona non grata* in the "apartheid" society of South Africa. But when Hutt says that South Africa's problems cannot be surmounted peacefully by anything other than a return to the classic liberalism of Locke, Hume, Tocqueville and Hayek, he is so obviously right that the "realists" should stand ashamed.

Hutt realizes that history is a ragged process, and that State-protected miscarriages of justice cannot be corrected overnight. Analyzing what went wrong in South Africa, Hutt says the perpetuation of race discrimination has been due to the use of State power and trade union collusion to preserve the status quo in the interests of an enfranchised white proletariat. The trade union leaders have insisted on a double standard of wages, with the color bar being invoked to keep blacks, "Cape Coloureds" (i.e., mestizos) and Indians from entering closed shop trade unions that have maintained their right to the better-paying occupations.

Obviously, a big majority of the South African whites believe that if there were a greater equality of social and economic status in the "beloved country," it would lead to a demand for the political equality of "one man, one vote." The immediate granting of universal suffrage would, so Hutt concedes, be a disaster. It would quickly degenerate to a condition of "one man, one vote, once." The black party, dominated by the strongest tribes, would quickly dispossess the whites, send the Indians packing to Asia

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or to England, and put the Cape Coloureds on a most uncomfortable sort of probation.

A Weighted Franchise

What Hutt suggests is that the repeal of economic and social apartheid should be coupled with the transitional requirement of a "weighted franchise" to reassure minorities that their property rights would be respected. There would be "an equal right to qualify for the vote" by passing educational tests and by acquiring enough property to become responsible taxpayers. An Upper House would be entrusted with the veto and power. The eventual membership of the Upper House would be designed to bring about gradual equality of representation for each of the four South African racial groups as such.

As an added reassurance, Hutt would have the President of his classically liberal Republic chosen from the judiciary, preferably by the judiciary. A Constitution would, in Jefferson's phrase, bind both the President and the legislature by the "chains" of its classical liberal provisions. The police force and the army would be responsible to the President.

The Case of Rhodesia

In Rhodesia there has been an actual attempt to apply Hutt's ideas of the "weighted franchise" and orderly progress toward a nondiscriminatory society that would guarantee the continuing right of a rancher to his acres, and the right of mine owners to sell their chrome ore or whatever at uncoerced market prices. But the sanctions imposed on Rhodesia, says Hutt, have crushed the "pure nonracial democracy there." On paper, the so-called Whitehead Constitution for Rhodesia "had created the nearest example to a pure 'J. S. Mill democracy' that has existed anywhere since the 1870s." But with Cubans now acting as Marxist Hessians along the borders of Rhodesia, the chances for a "weighted franchise" orderly transition in that country are extremely dubious. In all probability it will end in a "one man, one vote, once" Idi Amin type of horror, and then it will be South Africa's turn to face the Marxist wolves as people in the "civilized" nations of western Europe and America sanctimoniously avert their gaze.

The more purely economic essays in this Hutt collection all stress the virtue of price flexibility affecting the various factors of production, including labor. Hutt concedes that it has been a political impossibility to restore wage flexibility as long as Keynesian governments were dominated by trade union labor parties. The

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Webbs in England were privately convinced that the British trade union hierarchy was manipulated by "pigs," but they never dared say so in public. Well, "pigs" can't run things forever when an economy is drying up. Hutt, who has never had the influence he deserves, may be looking forward to a better tomorrow when the "pigs" wake up to the reality that the feed in the trough is entirely dependent on the willingness of enterprisers to renew it.

Individual Freedom: Selected Works of William H. Hutt may be ordered at $15.95 from The Foundation for Economic Education, Inc., Irvington-on-Hudson, New York 10533.

▸ HUMAN RIGHTS AND HUMAN LIBERTIES by Tibor R. Machan (Chicago: Nelson-Hall, 1975) 279 pp., $11.95.

Reviewed by Anne Wortham

ENTAILED in man's very nature are his rights, argues Dr. Machan, and the nature of these rights requires liberty for their exercise. But although he possesses rights and requires freedom, man has not always known how to justify these rights and defend freedom.

Machan points out that most people, even in the "free" world, do not know what freedom is. This is certainly true in the semi-free United States where we, "the People," have a long history of voluntarily voting for restrictions on our freedom. We have seen alleged defenders of human liberty advocate every manner of political solution, from structuring society to effect the greater good for the greatest number, to manipulating the differences among people to effect "the good of the least fortunate."

With so many suggestions before us on how to organize the human community according to what is morally good for people, we need to know what our rights are and why they are so crucial to us as individuals and to the community we have established. However, it is not enough to know what we mean by human rights; we must put them into practice in the course of our daily lives. They must assume the utmost importance to us — *personally*. It is important not only to be a morally virtuous person but also to find political solutions that make moral life possible for everyone.

Machan's basic maxim runs as follows: "Each and every person ought to have the maximum freedom of choice and action in the pursuit of his own aspirations, in the conduct of his life."

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But even after accepting the principle that everyone ought to live in maximum liberty, Machan tells us, "We are far from being able to identify what this would amount to in concrete circumstances." His next level of defense is to show "that each person could be free to choose and act in the conduct of his own life without obviating the same freedom for others." At this stage of his argument Machan introduces a corollary principle, which is that "each person ought to be free to acquire things in nature" – the right to property. Thence, he provides a moral defense of property and the free economic system, capitalism, while answering the critics in the process.

Finally, in support of property rights, he concludes with a statement that is truly radical in these days of the ever-expanding welfare state and the spreading cancer of the anticapitalistic mentality: "*Acquiring valuables is good.*" This is a simple observation but few people understand it, contemporary political theorists deny it, and many hard-working, tax-paying Americans continue to apologize for it.

While Dr. Machan criticizes the existing state of affairs, he does not demand – nor does his theory require – a basic change in human nature; a change in thinking is required to provide moral guidelines for our private affairs and community life. The fault of the human community is not the human condition – i.e., human nature – it is a lack of understanding of what the human condition is, what the human community can be and ought to be.

Machan's doctrine of rights is no utopian exercise. He addresses his inquiry and his criticism to "the potential excellence of individual human beings" – *as they exist,* without omniscience, with fallibility, capable of virtues as well as vices. "A community of fully rational, absolutely just, honest, productive human beings – all of whom could not falter from constant virtue – is not one for which our legal system should be designed! That cannot even serve as a model, since the laws of such a system could not adequately deal with the plain fact of evil."

Machan, addressing this work to the "educated layman," chose not to write it in the parlance of his profession. As a professor of philosophy, he continually delivers technical papers on the most complex philosophical questions before professional thinkers in the U.S. and abroad. Indeed, it is to his credit that he is able to expound the most crucial principles of man's existence in the simple and straightforward eloquence of un-

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ambiguous language laced with common sense and objectivity. Nevertheless, this material cannot be casually absorbed; one must think about what he is reading. And in so doing, he will find *Human Rights and Human Liberties* a challenging experience, sometimes difficult, but always rewarding.

▸ THE CONDITIONS OF FREEDOM by Harry Jaffa. (Baltimore: Johns Hopkins University Press, 1975) 280 pp., $12.50.

Reviewed by Haven Bradford Gow

"What is equality?" is a question of enduring interest and importance. Professor Jaffa attempts to formulate an answer in his latest work, *The Conditions of Freedom,* a collection of probing essays.

Any inquiry into the meaning of equality must include an examination of the Declaration of Independence, Professor Jaffa believes. The Declaration begins with an appeal to "the laws of Nature and of Nature's God," and maintains that the proposition "All men are created equal" is a self-evident truth. Furthermore, all men are endowed by their Creator with certain inalienable rights, among them "Life, liberty, and the pursuit of Happiness."

In seeking to understand and explain what the Declaration means by equality, Jaffa employs the method advocated by his mentor, the late Leo Strauss: no one should criticize a work until he has come to appreciate and understand the author's intention and perspective, and exactly what he is trying to communicate. If one wants to understand what the Founders of our nation meant by equality, one must scrutinize the Declaration of Independence until its key concepts, terms and phrases stand clear.

Throughout his discussion of the Declaration Professor Jaffa displays erudition, razor-like logic, and linguistic precision. Let us consider, for example, how he deals with the troublesome expressions, "self-evident truth" and "all men are created equal." A logical truth is a proposition in conformity with reality; it is a verbal statement that corresponds to something that exists outside the mind. A truth that is self-evident, writes Jaffa, is "one which is evident to anyone who grasps the terms of a proposition in which the truth is expressed." The truth "things equal to the same thing are equal to each other" is self-evident to any person who comprehends the meaning of "same" and "other." No one, comprehending these terms, can fail simultaneously to understand the meaning of "equal."

What the Founding Fathers

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meant by equality, observes Professor Jaffa, is this: All men share a common human *nature*, an assertion that depends upon the prior recognition of nature in general, of which human nature forms an important part. The assertion that all men are created equal means that all persons are the *same* in *some* respect; it does not mean that all men are identical, or equally talented, wise, prudent, intelligent or virtuous; rather, it means that all persons possess the inherent capacity to reason, to engage in propositional speech, to comprehend symbols, and to make free choices. Being *created* equal implies the inalienable rights stressed in the Declaration and from these rights corresponding obligations may be deduced.

According to Professor Jaffa, we seek to understand man and his rights, not merely by comprehending what he *is*, but also by understanding what he is *not*. Man is neither a beast nor the God referred to by the Signers of the Declaration. The God referred to by the Signers is a Being Who carries to absolute perfection the partially existing perfections observable in human beings – such as reason, justice, mercy and charity – without the corresponding imperfections. Persons formulate the idea of such a perfect being, not merely to comprehend this Supreme Being, but also to understand the limits of their own humanity.

Since men are neither beasts nor gods, they should not play God with other men, nor should they treat other men as beasts. This proposition is, as Professor Jaffa points out, "the elementary ground, not only of political, but of moral obligation." In short, "the source of the just powers of government lies in the proposition that all men are created equal."

▸ CONCEIVED IN LIBERTY, by Murray N. Rothbard (Arlington House, 165 Huguenot Street, New Rochelle, New York 10801, 1975) Vol. 1, 518 pp., $15; Vol. 2, 277 pp. $12.95.

Reviewed by Brian Summers

THESE are the first two volumes of a projected five-volume history of the American people from the first English settlements to the Constitution. The first covers to 1710. The second covers 1710-1760.

There are several features that distinguish these volumes and recommend them to the reader. First, Murray Rothbard is one of the few historians who understand economic theory. Throughout his narrative he uses economics to explain the antisocial nature of statist interventions such as wage and price controls, mercantilism,

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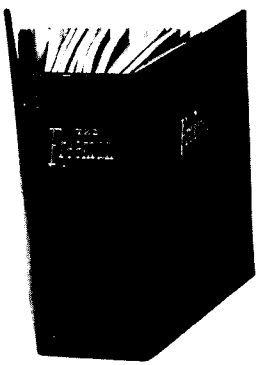
monopoly privileges, and inflation. Although Rothbard does a fine job in furnishing the reader with economic theory, it is best to approach these volumes – or any other history – with an understanding on at least the level of Henry Hazlitt's *Economics in One Lesson.* Without an understanding of economics, no one has the tools to analyze history.

Another feature distinguishing these volumes is the unabashed radical libertarianism of Dr. Rothbard. Focusing on the age-old conflict between human liberty and governmental coercion, he has no sympathy for imperialism, feudalism, slavery, conscription, censorship, or religious persecution. Although the narration is at times flavored with emotion, the analyses of episodes such as the Salem witchhunt, Bacon's Rebellion, the Zenger trial, and the Georgia experiment are never dull and often enlightening.

Of the two volumes, this reviewer preferred the second. At times, the first volume bogged down in intricate details of colonial politics. Also, the index to the first volume is inadequate. Happily, these flaws do not appear in the second volume.

In net balance, the first two volumes of *Conceived in Liberty* are exciting, enlightening works. This reviewer eagerly awaits the third volume, covering the period 1760-1775, scheduled for publication in June 1976.



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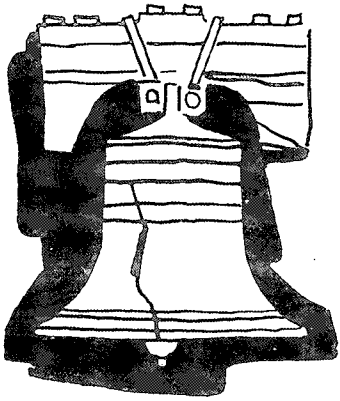

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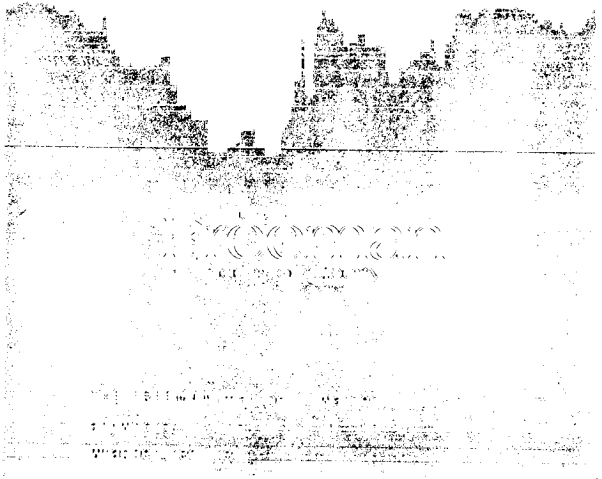

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